BellSouth Telecommunications, Inc.
Legal Department
1600 Williams Street
Suite 5200
Columbia, SC 29201

patrick.turner@bellsouth.com

Patrick W. Turner
General Counsel-South Carolina

803 401 2900
Fax 803 254 1731

March 8, 2005

Mr. Charles Terreni
Chief Clerk of the Commission
Public Service Commission of South Carolina
Post Office Drawer 11649
Columbia, South Carolina 29211

Re: Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting From Changes of Law
Docket No. 2004-316-C

Dear Mr. Terreni:

Enclosed for filing are the original and ten copies of BellSouth Telecommunications, Inc.'s Brief in Response to Petition for Emergency Relief in the above-referenced matter. By copy of this letter, BellSouth is serving this Brief on all parties of record to this docket. By separate cover, BellSouth also is submitting a Proposed Order for the Commission's consideration.

Sincerely,

Patrick Turner

Patrick W. Turner

PWT/nml
Enclosure
cc: All Parties of Record

PC Docs #575341

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

In Re:	)	
	)	Docket No. 2004-316-C
Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting From Changes of Law	)	

BELLSOUTH TELECOMMUNICATIONS, INC.'S BRIEF IN RESPONSE TO PETITION FOR EMERGENCY RELIEF

In compliance with the Order the Public Service Commission of South Carolina ("the Commission") entered in this docket on March 4, 2005, BellSouth Telecommunications, Inc. ("BellSouth") respectfully submits this Brief in Response to the Petition for Emergency Relief ("Petition") submitted by the Joint Petitioners on March 2, 2005.[1] This Brief supports the Proposed Order simultaneously filed by BellSouth in this docket. For the reasons set forth below, the Public Service Commission of South Carolina ("the Commission") should deny the Petition and all relief requested by others.

I. SUMMARY POSITION

For nearly a decade, the Joint Petitioners and other competitive local exchange companies ("CLECs") have received that to which they have not been entitled.[2] In its

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[1] BellSouth also is aware of an "Emergency Petition" that Amerimex Communications Corp. filed on March 4, 2005, and this Brief addresses the arguments presented in that Petition. Finally, BellSouth is aware of a letter ITC^DeltaCom Communications, Inc. submitted to the Commission on February 23, 2005 and of a similar letter that Navigator Telecommunications, LLC submitted on March 3, 2005. This Brief, including specifically Exhibit A, addresses these letters.

[2] *See United States Telecom Ass'n v. FCC*, 359 F.3d 554, 595 (D.C. Cir. 2004)(*USTA II*)(vacating vast portions of the FCC's *Triennial Review Order* and noting

Triennial Review Remand Order ("TRRO"),[3] the Federal Communications Commission ("FCC") took a long-overdue step toward correcting this inequity by identifying a number of former Unbundled Network Elements ("UNEs") for which there is no unbundling obligation under section 251 of the federal Telecommunications Act of 1996 ("the federal Act"). BellSouth is ready and willing to negotiate, pursuant to section 252 of the federal Act, the transition of the embedded base of existing customers served by network elements that no longer must be unbundled, under the framework adopted by the FCC in the *TRRO*. Clearly, there is no "emergency" with regard to this transition, because the *TRRO* provides at least one year for the parties to accomplish this transition.[4]

The real dispute at this point is whether, after March 10, 2005, the CLECs can perpetuate an unlawful unbundling regime by continuing to order these former UNEs as though they continue to be UNEs. In other words, after March 10, 2005, can the Joint Petitioners order a former UNE from BellSouth and pay the TELRIC rates for that item when the FCC has made it clear that that item is no longer a UNE that must be provided at TELRIC rates?[5]

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the FCC's "failure, after eight years, to develop lawful unbundling rules, and its apparent unwillingness to adhere to prior judicial rulings.").

[3] In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313 and CC Docket No. 01-338, *Order on Remand*, FCC 04-290 (released February 4, 2005) (*"TRRO"*) (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-290A1.pdf).

[4] The applicable transition period is one year from some items, and it is longer for others.

[5] See Petition at pp. 3-4 (requesting "unfettered access" to "new adds" for high capacity loops, high capacity transport, and UNE-P from March 11, 2005 until their existing interconnection agreements "are replaced by new interconnection agreements resulting from the upcoming arbitration between the parties.").

In support of their request to continue ordering certain items as UNEs even after the FCC has said they cannot, the Joint Petitioners allege that with regard to high-capacity loops, high capacity transport, and UNE-P arrangements, the *TRRO* provides carriers "twelve months from the effective date of [the *TRRO*] to modify their interconnection agreements, including completing any change of law processes,"[6] thus concluding that they can continue to order these items unabated until their existing contracts are replaced with new contracts. As explained below, however, the FCC plainly said that these transition periods apply only to the embedded customer base and that they do not permit competitive LECs to add new items as UNEs where the FCC has determined that no Section 251(c) unbundling requirement exists with regard to such items.[7] The Joint Petitioners attempt to evade this language, which clearly compels a denial of their request, by claiming that "the *TRRO* is not self-effectuating with regard to 'new adds' or, for that matter, in any other respect (including any changes in the rates of [sic] the availability of access to UNEs)."[8] The FCC, however, plainly said that "the impairment framework we adopt is self-effectuating, forward-looking, and consistent with technology trends that are reshaping the industry."[9]

The Joint Petitioners, therefore, are simply wrong when they accuse BellSouth of attempting to "unilaterally amend or breach its existing interconnection agreements with the Joint Petitioners . . . ."[10] BellSouth will not breach its interconnection agreements, and BellSouth will not act unilaterally to modify these agreements. Rather, the FCC's

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6 *See* Petition at ¶¶19, 20, and 21.
7 *TRRO*, ¶142, ¶195, ¶227.
8 *See* Petition at p. 9, ¶18.
9 *TRRO* at ¶3 (emphasis added).
10 *See* Petition at p.1.

actions in the *TRRO* constitute a generic self-effectuating change for all interconnection agreements with regard to "new adds" for network elements that no longer must be unbundled pursuant to section 251 of the federal Act.

It is clear that the Joint Petitioners want exactly what the FCC has said they cannot have. To make matters worse, they are asking this Commission to rule that the FCC did not mean what it clearly said. For all of the reasons set forth below, the Commission should deny this illogical and unreasonable request.

II. BACKGROUND

On February 4, 2005, the FCC released its permanent unbundling rules in the *TRRO*. Although the *TRRO* is approximately 180 pages long, its findings are summarized in just a few paragraphs in the Order. For the Commission's convenience, Exhibit B is a copy of those paragraphs of the *TRRO*.

The *TRRO* identified a number of former UNEs for which there is no unbundling obligation under Section 251 of the federal Act. Among these former UNEs are switching,[11] high capacity loops in specified central offices,[12] dedicated transport between a number of central offices having certain characteristics,[13] and dark fiber.[14] Recognizing that it removed significant unbundling obligations formerly placed on incumbent local exchange carriers ("ILECs") like BellSouth, the FCC adopted transition plans to move the embedded base of these former UNEs to alternative serving arrangements.[15] The FCC clearly said that the transition period for each of these former

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11 *TRRO*, ¶199.
12 *TRRO*, ¶¶ 174 (DS3 loops), 178 (DS1 loops).
13 *TRRO*, ¶¶ 126 (DS1 transport), 129 (DS3 transport).
14 *TRRO*, ¶¶ 133 (dark fiber transport), 182 (dark fiber loops).
15 *TRRO*, ¶¶ 142 (transport), 195 (loops), 226 (switching).

UNEs -- loops, transport, and switching -- would commence on March 11, 2005.[16] Accordingly, under the framework the FCC adopted, the parties must negotiate, pursuant to section 252 of the federal Act, the transition of the embedded base of existing customers served by network elements that no longer must be unbundled. BellSouth is prepared to do this.[17]

While the FCC explicitly discussed how to transition the embedded base of these former UNEs through change of law provisions in existing interconnection agreements, the FCC clearly took a much different approach with regard to the issue of "new adds." For new adds, the FCC's belief "that the impairment framework we adopt is self-effectuating" controls.[18] Instead of requiring ILECs to continue to allow CLECs to order more of the former UNEs during the transition period, the FCC provided that no new adds would be allowed. With regard to switching, for example, the FCC explained that "[t]his transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching."[19] The FCC continued, finding that "[t]his transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251

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[16] *TRRO*, ¶¶ 143 (transport), 196 (loops) 227 (switching).

[17] Accordingly, to the extent that the Petition addresses the embedded base of UNEs, there simply is no reason for this Commission to treat the Petition on an "emergency" basis.

[18] *TRRO*, ¶3.

[19] *TRRO*, ¶199(emphasis added); *see also* 47 C.F.R. §51.319(d)(2)(iii) ("[r]equesting carrier may not obtain new local switching as an unbundled network element."). This new C.F.R. provision is set forth in Appendix B to the *TRRO*.

(c)(3) except as otherwise specified in this Order."[20] The *TRRO* contains similar provisions regarding loops and transport that are no longer subject to unbundling under Section 251 of the federal Act.[21]

It is abundantly clear that these provisions regarding "new adds" are self-effectuating. The FCC, for example, specifically said that "[g]iven the need for prompt action, the requirements set forth here shall take effect on March 11, 2005 . . . ."[22] Additionally, the FCC knew that in many instances, ILECs and CLECs voluntarily have entered commercial arrangements (as opposed to interconnection agreements negotiated or arbitrated under the federal Act) that address items for which there is no section 251 unbundling obligation. The FCC consciously addressed these commercial arrangements, saying that the *TRRO* would not "supersede any alternative arrangements that carriers voluntarily have negotiated on a commercial basis . . . . "[23] Significantly and conspicuously, there is no similar language addressing existing interconnection agreements – nowhere in the *TRRO* does the FCC say that it does not supersede interconnection agreements that carriers have entered into as required by Sections 251 and 252 of the federal Act. Consequently, in order to have any meaning, the *TRRO*'s provisions precluding the ordering of "new adds" have to mean that as of March 11,

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[20] *TRRO*, ¶227 (emphasis added). Footnote 627 addresses the "except as otherwise specified in this Order" clause in Paragraph 227, making it clear that this clause refers to continued access to continued access during the transition to items associated with switching – specifically, shared transport, signaling and call-related databases. Contrary to assertions that certain parties have made before other state Commissions, this clause clearly was not some mystically veiled reference to the change of law process.

[21] *See, e.g.*, ¶195, 47 C.F.R. §51.319(e)(2)(ii)(C) & (e)(2)(iii)(C) (transport) and ¶227, 47 C.F.R. §51.319(a)(4)(iii) & (a)(5)(iii)(loops).

[22] *TRRO*, ¶ 235.

[23] *TRRO*, ¶ 199. *See also Id.*, ¶¶148, 198.

2005, CLECs may not order new adds as UNEs under existing interconnection agreements.[24]

III. IMPACT OF *TRRO* IN SOUTH CAROLINA

As a result of the FCC's rulings in the *TRRO,* local circuit switching is no longer a UNE anywhere in South Carolina.[25] The FCC's findings regarding most other items addressed in the *TRRO* have a much more limited impact in South Carolina. The FCC, for instance, only removed unbundling requirements for high capacity loops in specified central offices[26] and for dedicated transport between a number of central offices having certain characteristics.[27] Of the more than 100 BellSouth central offices in South Carolina, only 9 currently are affected by the FCC's rulings regarding transport and loops.[28] More specifically:

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[24] The Joint Petitioners argue that in Paragraph 233 of the *TRRO,* the FCC states that the "normal section 252 negotiations process applies" with regard to new adds. *See* Petition at pp 10-11, n. 25. They are wrong. Paragraph 233 provides that "carriers must implement changes to the interconnection agreements consistent with our conclusions in this Order." While the Joint Petitioners focus on the interconnection agreement portion of the sentence, they ignored the "consistent with our conclusions in this Order" clause. To be consistent with the conclusions in the Order, the transition plan for the embedded base of UNE-Ps will be implemented via the change of law process, but the prohibition against new UNE-Ps is self-effectuating. The first two sentences of paragraph 233 simply confirm that changes to the interconnection agreement should be consistent with the framework established in the *TRRO,* whether self-effectuating or via change of law.

[25] *TRRO,* ¶199. ("Applying the court's guidance to the record before us, we impose no section 251 unbundling requirement for mass market local circuit switching nationwide."). As the FCC noted in the *TRRO,* it had already removed unbundling obligations in the enterprise switching market, and that decision was upheld by the courts. *See TRRO,* ¶201

[26] *TRRO,* ¶¶ 174 (DS3 loops), 178 (DS1 loops).

[27] *TRRO,* ¶¶ 126 (DS1 transport), 129 (DS3 transport).

[28] These wire centers are identified in BellSouth's February 18, 2005 letter to the FCC. This letter is available at the following website: http://interconnection.bellsouth.com/notifications/carrier/carrier_pdf/91085045.pdf.

Dedicated DS3 transport connecting any of the following 9 central offices to one another is no longer a UNE: Columbia – Senate Street; Greenville – Dial & Toll; Charleston – Dial & Toll; Columbia - St. Andrews; Charleston – North; Florence – Main; Greenville – Woodruff Rd; Mt. Pleasant – Main; and Spartanburg – Main.[29]

Dedicated DS1 transport connecting any of the following 4 central offices to one another is no longer a UNE: Columbia - Senate Street; Greenville – Dial & Toll; Charleston – Dial & Toll, and Columbia - St. Andrews.[30]

DS3 loops in the following 2 central offices are no longer UNEs: Columbia – Senate Street; and Greenville – Dial & Toll.[31]

DS1 loops in the following 2 central offices are no longer UNEs: Columbia – Senate Street; and Greenville – Dial & Toll.[32]

To put these DS1 and DS3 designations into perspective, a DS0 transmission facility (which remains a UNE in all cases in South Carolina) can carry a single voice channel. A DS1 transmission facility (which remains a UNE in most cases in South Carolina) can simultaneously carry 24 voice channels. A DS3 transmission facility (which remains a UNE in most cases in South Carolina) can simultaneously carry 672 voice channels.

IV. ARGUMENT

The Joint Petitioners have ignored the FCC's clear statement as of March 11, 2005, CLECs may not order new adds as UNEs under existing interconnection agreements, and they complain to this Commission concerning BellSouth's announced

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[29] Dedicated DS3 transport is still a UNE if it connects: (1) one of these central offices to any of the more than 100 central offices that is not on this list; or (2) any of the more than 100 central offices that are not on this list to one another.

[30] Dedicated DS1 transport is still a UNE if it connects: (1) one of these central offices to any of the more than 100 central offices that is not on this list; or (2) any of the more than 100 central offices that are not on this list to one another.

[31] DS3 loops are still UNEs in each of the more than 100 central offices that are not on this list.

[32] DS1 loops are still UNEs in each of the more than 100 central offices that are not on this list.

intent to reject orders for these former UNEs on March 11, 2005.[33] In doing so, Joint Petitioners raise three specific arguments. First, they argue that BellSouth has an obligation under the parties' existing interconnection agreement to continue to accept orders for these former UNEs until those interconnection agreements are changed. Second, although they do not (and cannot) provide any legal support for the proposition, they erroneously suggest that state law imposes some obligation on BellSouth to continue accepting new adds. Finally, they argue that an agreement that was executed in another proceeding long before the *TRRO* was issued requires BellSouth to allow them to continue accepting new adds despite the FCC's plain holding that it is not required to do so. As explained below, none of these arguments have merit, and the Commission should reject each of them.

A. The FCC's Bar On "New Adds" Is Self-Effectuating And Relieves BellSouth Of Any Obligation Under Its Interconnection Agreements To Provide These Former UNEs To Joint Petitioners.

BellSouth does not dispute that the parties are operating under interconnection agreements that contain change of law provisions. However, that simply is not the issue here. If the FCC had held that the Joint Petitioners could continue to add more former UNEs until their interconnection agreements were changed pursuant to the change of law provisions found in them, or even if the FCC had been silent on the question of "new adds," then presumably no dispute would exist between the Joint Petitioners and BellSouth. Neither situation is the case here, however, and the Joint Petitioners' motion disregards what the FCC actually said in the *TRRO*.

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[33] On February 14, 2005, BellSouth filed with the Commission a copy of the Carrier Notification by which BellSouth announced its intent to all CLECs. Exhibit C is a copy of that filing.

The FCC said unequivocally that there would be a transition period for the embedded base of UNEs that would begin on March 11, 2005 and that would last 12 months. With regard to UNE-P, for example, the FCC said: "we adopt a transition plan that requires competitive LECs to submit orders to convert their UNE-P customers to alternative arrangements within twelve months of the effective date of this order."[34] The FCC also said unequivocally that this "transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching . . . .."[35] How much clearer could the FCC be?

The Joint Petitioners claim that when the FCC said that there will be a transition period, that it will begin on March 11, 2005, and that there will be no "new adds" during that transition period, the FCC did not really mean it. Despite the FCC's plain statements to the contrary, the Joint Petitioners claim that BellSouth is obligated to continue to provide new UNEs until their contracts with BellSouth are amended pursuant to change of law provisions therein. This claim is wholly inconsistent with the language of the *TRRO*.

First, the FCC understood that existing interconnection agreements often contained "change of law" provisions. For instance, the FCC specifically contemplated that the contract provisions for the transition of the embedded base of former UNEs would be effectuated through the change of law process. Further, the FCC provided that throughout the 12-month transition period (during which the FCC clearly said there would be no "new adds"), CLECs would continue to have access to the embedded UNE

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[34] *TRRO*, ¶199. *See also Id.*, ¶¶142 (transport), 195 (loops).
[35] *Id.* ¶227. *See also Id.*, ¶¶142 (transport); 195 (loops).

base, but at the commission-approved TELRIC rate plus an FCC-designated additive, until the migration of the embedded base was complete.[36] Finally, the FCC made the increase in the rates of the former UNEs retroactive to the effective date of the order to preclude gaming by the CLECs during the negotiation process.[37]

The FCC's obvious reason for making the increased rates retroactive is to keep CLECs like the Joint Petitioners from unnecessarily delaying the amendment process and gaming the system by postponing the date for the higher rates applicable to the embedded base of UNEs. It is equally clear that the FCC did not directly address amending existing interconnection agreements to eliminate any requirement that ILECs provide new adds. If the FCC had intended to allow new adds until the interconnection agreements were amended, it could have easily said so. It did not. Instead, it made specific provision that the transition period did not authorize new adds. The only reasonable, logical and legally sound conclusion is that the provisions prohibiting new adds were intended by the FCC to be self-effectuating.

There is no question that the FCC has the legal authority to create self-effectuating changes to existing interconnection agreements as it has done here. Indeed, in the *Triennial Review Order("TRO")*,[38] the FCC decided not to make its decisions self-

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[36] *TRRO* at ¶¶145,198, 228.

[37] *TRRO*, nn. 408 (transport); 524 (loops), 630 (switching). Thus, if Joint Petitioners ultimately executed an interconnection agreement amendment on May 11, 2005, the transition period rates would apply as of March 11, 2005 and Joint Petitioners would need to make a true-up payment to BellSouth.

[38] *Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers; Implementation of the Local Competition Provisions of the Telecommunications Act of 1996; Deployment of Wireline Services Offering Advanced Telecommunications Capability*, CC Docket Nos. 01-338, 96-98, 98-147, Report and Order and Order on Remand and Further Notice of Proposed Rulemaking, 18 FCC Rcd 16978, 17145, para. 278 (2003) (*Triennial Review Order*), *corrected by* Errata, 18 FCC

executing – "many of our decisions in this order will not be self-executing."[39] The FCC's authority to make self-effectuating changes exists under the *Mobile-Sierra* doctrine, which allows the FCC to negate any contract terms of regulated carriers so long as the FCC makes adequate public interest findings. Thus, "[f]or all contracts filed with the FCC, it is well-established that 'the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful and to modify other provisions of private contracts when necessary to serve the public interest.'"[40]

The FCC has applied *Mobile-Sierra* to require a fresh look at contracts between ILECs and CMRS providers executed before the 1996 Telecommunications Act in light of the reciprocal compensation provisions of §251(b)(5) of the Act. In relevant part, citing *Western Union Tel. Co. v. FCC*, the FCC explained that "[c]ourts have held the Commission has the power ... to modify ... provisions of private contracts when necessary to serve the public interest."[41] The *TRRO* makes it clear that in the case of new adds, self-effectuating modification of interconnection agreements is necessary to serve the public interest. The FCC, for instance, explained that it declined to require unbundling of mass market local switching

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Rcd 19020 (2003) (*Triennial Review Order Errata*), *vacated and remanded in part, affirmed in part, United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2004) (*USTA II*) *cert. denied*, 125 S.Ct. 313, 316, 345 (2004).

[39] *See TRO*, ¶ 700

[40] *Cable & Wireless, P.L.C. v. FCC*, 166 F.3d 1224, 1231-32 (D.C. Cir. 1999) (*quoting Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987).*Citing, in turn, FPC v. Sierra Pac. Power Co.*, 350 U.S. 348, 353-55 (1956) *and United Gas Co. v. Mobile Gas Corp.*, 350 U.S. 332, 344 (1956) (the FCC has the power to set aside any contract which it determines to be "unjust, unreasonable, unduly discriminatory, or preferential.").

[41] *First Report and Order*, 11 FCC Rcd 15499, ¶ 1095 (1996) (additional citations omitted).

> based on the investment disincentives that unbundled local circuit switching, and particularly UNE-P, creates. Five years ago, the Commission expressed a preference for facilities-based competition. This preference has been validated by the D.C. Circuit as the correct reading of the statute. Since its inception, UNE-P was designed as a tool to enable a transition to facilities-based competition. It is now clear, as discussed below, that, in many areas, UNE-P has been a disincentive to competitive LECs' infrastructure investment. Accordingly, consistent with the D.C. Circuit's directive, we bar unbundling to the extent there is any impairment where – as here – unbundling would seriously undermine infrastructure investment and hinder the development of genuine, facilities-based competition.[42]

As a matter of national public policy, unbundled switching adversely impacts the public by creating disincentives for the creation of facilities-based competition – which competition has been found to be the fundamental objective of the Act. The FCC has spoken – and Joint Petitioners cannot ignore its message by hiding behind interconnection agreements that have been modified by the self-effectuating new rules to address the national public policy and the objectives of the Act.

That these interconnection agreements are filed with and approved by the state commissions, rather than the FCC, has no impact on the FCC's ability to change these contracts when it is in the public interest to do so. While *Cable & Wireless P.L.C. v. FCC* applied to "all contracts filed with the FCC,"[43] the reference to "filing" means that decision applies to all contracts and other agreements *that are subject to the FCC's authority not just contracts actually filed with the FCC.*[44] Thus, as the Supreme Court made clear in *Iowa Utilities Bd.,* state commissions perform their functions subject to FCC rules designed to implement the statute and establish the public interest.

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42 *TRRO* at ¶218.

43 *Cable & Wireless,* 166 F.3d at 1231.

44 *See AT&T Corp. v. Iowa Utils. Bd.*, 525 U.S. 380, 381 (1999).

Another policy consideration leans heavily in favor of denying the Petition. The FCC has been clear that commercial negotiations can produce pro-competitive and pro-consumer outcomes,[45] and to date, BellSouth has successfully negotiated over 40 commercial agreements with CLECs for the purchase of a wholesale local voice platform service. If this Commission accepts the Joint Petitioners' position, progress in this area could come to a halt, at least in the near term. If CLECs know that they can continue adding new unbundled network elements at TELRIC rates until the amendment and arbitration process is completed (which can take up to twelve months under the *TRRO)*, they will have no reason to enter into a commercial agreement at this time. Significantly, allowing CLECs to continue adding unbundled network elements until the amendment and arbitration process has been completed, even though they are not impaired, unfairly prejudices those carriers that have entered into commercial agreements. As noted above, the *TRRO* does not supersede these commercial agreements.[46] Thus, carriers that have entered into commercial agreements will be forced to compete for new customers against CLECs that can undercut their prices solely by virtue of these CLECs getting to pay TELRIC rates.

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[45] Press Statement of Chairman Michael K. Powell and Commissioners Kathleen Q. Abernathy, Michael J. Copps, Kevin J. Martin and Jonathan S. Adelstein On Triennial Review Next Steps, March 31, 2004; *see also* FCC Chairman Michael K. Powell's Comments on SBC's Commercial Agreement With Sage Telecom Concerning The Access To Unbundled Network Elements, April 5, 2004 (expressing hope "for further negotiations and contracts - so that America's telephone consumers have the certainty they deserve"); FCC Chairman Michael K. Powell Announces Plans For Local Telephone Competition Rules, June 14, 2004 (strongly encouraging "carriers to find common ground through negotiation" because "[c]ommercial agreements remain the best way for all parties to control their destiny").

[46] *TRRO*, ¶ 199. *See also Id.*, ¶¶148, 198.

Finally, BellSouth has been inviting CLECs to negotiate agreements for the provision of those items on a commercial basis since the courts and the FCC began eliminating BellSouth's obligation to provide items on an unbundled basis. On March 23, 2004, for example, BellSouth issued Carrier Notification SN91084043 that states:

> In light of the [D.C. Circuit's *USTA II*] Order, BellSouth is prepared to offer switching and DS0 loop/switching combinations (including what is currently known as UNE-P) at commercially reasonable and competitive rates. . . . Consistent with the direction provided by FCC Chairman Michael Powell, BellSouth invites your company to enter into good faith negotiations of a market-based commercial agreement aimed at benefiting the end user, establishing stability in the industry and allowing real competition to continue throughout the BellSouth region. Entering into such an agreement will effect an efficient transition from switching under your existing Interconnection Agreement to switching offered on a commercial basis.[47]

In the year since this Notification was issued, more than 40 CLECs have entered into commercial agreements with BellSouth, and BellSouth has recently released another Carrier Notification (SN91085061) reiterating several options involving switching, loops and transport that CLECs can use to serve their new customers. The Joint Petitioners should avail themselves of one or more of these options, as more than 40 CLECs alredy have done.

In summary, the FCC has full authority to issue a self-effectuating order that eliminated CLECs' ability to place "new add" orders as UNEs after March 10, 2005. That existing interconnection agreements have not been formally modified to implement that finding is irrelevant. Through the *TRRO* the FCC has exercised its authority in a manner that trumps Joint Petitioner's individual contract, and BellSouth has no obligation to provide new adds to Joint Petitioners on or after March 11, 2005.

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[47] This Notification is Exhibit B to the Letter BellSouth filed with the Commission on March 8, 2005.

B. State Law Does Not Require BellSouth to Continue Accepting New Adds.

Without providing any legal argument to support their contentions, the Joint Petitioners suggest that Sections 58-3-140, 58-3-170, 58-9-1080, and/or 58-9-280 would allow the Joint Petitioners to order "new adds" as UNEs despite the FCC's plain ruling to the contrary.[48] These contentions fail for many reasons. First, the FCC's national policy preempts any state commission from ordering the unbundling of any of the items that the FCC has declined to unbundled under section 251 of the federal Act. Second, by its own terms and pursuant to the Commission's Order implementing it, Section 58-9-280 does not grant the Joint Petitioners any unbundling rights to which they are not entitled under federal law. Third, Section 58-9-280 does not provide for combinations of UNEs, which is what the Joint Petitioners seek to the extent that they want to continue obtaining UNE-P arrangements as new adds. Fourth, the older and more general Sections 58-3-140, 58-3-170, and 58-9-1080 do not (and cannot) provide the Joint Petitioners with relief that the more recent and more specific Section 58-9-280 does not grant. Finally, BellSouth cannot be required, on the basis of a state law claim, to address new adds by way of an interconnection agreement.

1. The FCC has issued a national policy that preempts the field.

An order obligating BellSouth to continue to provide new adds after March 10, 2005 under state law would directly conflict with federal law and, therefore, would be preempted. The FCC has held that CLECs are not impaired without access to various items that formerly were UNEs. The FCC further concluded that CLECs were not entitled to place new orders for these items as UNEs after March 10, 2005. Any state

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[48] *See* Petition at p. 5, ¶6.

requirement to provide such new adds as UNEs would directly conflict with the national finding of no impairment. This conflict necessitates preemption of the state law by the federal law to avoid the state thwarting the governing federal policy.

In section 251(d)(2) of the Act, Congress specifically "charged the [FCC] with identifying" which network elements are to be unbundled.[49] Thus, once the FCC determines that an item is not a UNE, a state commission may not reach the opposite conclusion. That is why the FCC has said that States are not free to "impose any unbundling framework they deem proper under state law, without regard to the federal regime,"[50] and that "[i]t will be necessary" for the state commissions "to amend their rules and to alter their decisions to conform to" the new national unbundling rules.[51] The FCC went on to say that it would be "unlikely" that any "decision pursuant to state law" that "require[d] the unbundling of a network element for which the Commission has...found no impairment" could be consistent with federal law.[52]

2. By its own terms, and pursuant to the Commission's Order implementing it, Section 58-9-280 does not grant the Joint Petitioners any unbundling rights to which they are not entitled under federal law.

Even if the *TRRO* did not have preemptive effect (and it does), Section 58-9-280 still would not grant the Joint Petitioners the relief they seek. Section 58-9-280(C)(3) authorizes the Commission to determine "requirements" that are "applicable to all local telephone service providers," and it provides that among other things, these requirements must "provide for the reasonable unbundling of network elements upon a request from a

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49 *USTA v. FCC,* 290 F.3d 415, 422 (D.C. Cir. 2002) ("*USTA I*").
50 TRO ¶ 192.
51 *TRO* ¶ 195.
52 *Id.*

LEC where technically feasible and priced in a manner that recovers the providing LEC's cost . . . ." Significantly, the statute plainly states that any unbundling requirements established by the Commission "shall be consistent with applicable federal law . . . ."[53] Moreover, the Commission has entered an Order stating that it will implement the unbundling provisions of section 58-9-280 "by concurring with the Federal Telecommunications Act of 1996."[54] Clearly, this statute does not (and cannot) grant the Joint Petitioners unbundled access to items that the FCC has determined are not subject to the federal Act's unbundling requirements.

Additionally, while Section 251 of the federal Act states that the Commission "shall have the authority to require local exchange companies to provide additional interconnection services and unbundling," this authority must be exercised such that it does not conflict with the federal unbundling statute, namely section 251. In section 251, the federal law explicitly requires that "[i]n determining what network elements should be made available for purposes of subsection (c)(3), the [FCC] *shall* consider, at a minimum whether ... the failure to provide access to such network elements would impair the ability of the telecommunications carrier seeking access to provide the services that it seeks to offer." In other words, neither the FCC, nor this Commission, can order unbundling of a particular element unless it conducts an impairment analysis and the element meets the necessary and impair standard.

It is black letter law that when two statutes, one state and one federal, govern the same activity, the statutes may not conflict. The only way to reconcile the state

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53 S.C. Code Ann. §58-9-280(C)(emphasis added).

54 *See* Order Implementing Requirements, *In Re: Generic Proceeding to Address Local Competition in the Telecommunications Industry in South Carolina*, Order No. 96-545 in Docket No. 96-018-C at pp. 1-2 (August 9, 1996)(emphasis added).

unbundling statute with the federal statute is to read them such that the impairment test in § 251(d)(2) applies at both the state and federal level. Ordering the provision of new adds without applying any impairment test would violate the basic tenant of the D.C. Circuit's opinions in *USTA I* and *USTA II* that the FCC "may not 'loftily abstract [ ] away from all specific markets' ... but must instead implement a 'more nuanced concept of impairment.'"[55]

Section 251(d)(3) supports the interpretation of the state statute that requires an impairment analysis prior to any unbundling. Section 251(d)(3) provides in relevant part that the FCC "shall not preclude the enforcement of any regulation, order, or policy of a State commission that . . . (B) is consistent with the requirements of this section; and (C) does not substantially prevent implementation of the requirements of this section and the purposes of this part." Obviously, a state order requiring unbundling of a network element without the requisite impairment analysis would not be consistent with the requirements of section 251 and would "substantially prevent implementation of the requirements of this section."[56] As the D.C. Circuit held, "[a]fter all, the purpose of the Act is not to provide the widest possible unbundling, or to guarantee competitors access to ILEC network elements at the lowest price that government may lawfully mandate."[57] Rather, the purpose of the federal regime is to unbundle elements only to the extent necessary to prevent impairment.

Thus, even assuming for purposes of discussion that the Commission could require additional unbundling, it has not conducted the specific impairment analysis

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55 *See USTA II,* 359 F.3d at 569 (quoting *USTA I*).

56 *See* § 251(d)(3).

57 *USTA II,* at 576.

required in order to reconcile the state unbundling law with the federal law. This impairment analysis would be required in order for BellSouth to provide new adds as UNEs after March 10, 2005, even if the matter were not otherwise preempted.

3. State law does not provide for combinations.

Even if the Commission's ability to order further unbundling had not been preempted, and even if the Commission had made an appropriate impairment analysis, the Joint Petitioner's request that the Commission issue an order under state law perpetuating UNE-P is further flawed because state law does not empower the Commission to order combinations – rather, it is limited to "unbundling."[58] Thus, even if the Commission could order BellSouth to unbundle switching (which it cannot), it cannot order BellSouth to combine switching with another element.

4. The earlier and more general sections 58-3-140, 58-3-170, and 58-9-1080 do not (and cannot) provide the Joint Petitioners with relief that the more recent and more specific Section 58-9-280 does not grant.

The Joint Petitioners suggest that Sections 58-3-140, 58-3-170, and 58-9-1080 allow the Joint Petitioners to order "new adds" as UNEs despite the FCC's plain ruling to the contrary.[59] None of these sections, however, specifically addresses unbundling – instead, each section addresses the powers of the Commission in broad, general terms. Moreover, the provisions of these sections have been law for decades.

In sharp contrast, Section 58-9-280(C) specifically addresses unbundling, and it was enacted in 1996 – long after the provisions cited by the Joint Petitioners were codified. Under well-established principles of South Carolina law, therefore, these earlier

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58 *See* S.C. Code Ann. §58-9-280(C).

59 *See* Petition at p. 5, ¶6.

and more general code sections do not (and cannot) grant the Joint Petitioners relief that the more recent and more specific Section 58-9-280(C) does not.[60]

5. BellSouth cannot be required, on the basis of a state law claim, to address new adds by way of an interconnection agreement.

The Joint Petitioners are asking the Commission to rule that their existing interconnection agreements require BellSouth to allow them to order new adds after March 10, 2005, based on state law. Interconnection agreements are governed by Section 252 of the federal Act, including any elements that might be governed by state law (assuming there could be any such elements in the first place, in view of the federal preemption of the field). As one federal appellate court has explained:

> If [a state commission] must arbitrate any issue raised by a moving party, then there is effectively no limit on what subjects the incumbent must negotiate. This is contrary to the scheme and the text of that statute, which lists only a limited number of issues on which incumbents are mandated to negotiate. See 47 U.S.C. §§251(b),(c) (setting forth the obligations of all local exchange carriers and incumbent local exchange carriers, respectively).[61]

As explained above, new adds are no longer subject to any section 251 unbundling requirement. BellSouth, therefore, cannot be required, on the basis of a state law claim, to address new adds by way of an interconnection agreement that is governed by section 252 of the federal Act.

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[60] *See Duke Power Co. V. South Carolina Pub. Serv. Comm'n*, 326 S.E.2d 395, 399 (S.C. 1985)("Laws giving specific treatment to a given situation take precedence over general laws on the subject, and later legislation takes precedence over earlier laws.").

[61] *See MCI Telecomm. Corp. v. BellSouth Telecom. Corp.*, 298 F.3d 1269, 1274 (11th Cir. 2002)(emphasis added).

C. The Joint Petitioners' Claims Regarding the Scope of the Abeyance Agreement are Merit less And Should Be Rejected.

Recognizing that neither federal nor state law affords them the relief they seek, the Joint Petitioners offer an illogical and erroneous interpretation of the Abeyance Agreement.[62] As an initial matter, this argument is a red herring that is not applicable to this proceeding. Even if that were not the case, however, the Joint Petitioners' argument would still have no merit. The operative paragraph of the Abeyance Agreement provides that

> Joint Petitioners seek to withdraw their Petition in order to allow the parties to incorporate the negotiation of those issues precipitated by *USTA II*,[63] as well as to continue to negotiate previously identified issues outstanding between the Joint Petitioners and BellSouth. The Joint Petitioners and BellSouth have agreed that they will continue to operate under their current Commission-approved interconnection agreements until such time as they move into a new agreement (either via negotiated agreement or via arbitration pursuant to a subsequent petition for arbitration of a new interconnection agreement). The Parties further agree that any subsequent petition for arbitration will be filed within 135 to 160 days of entry of a Commission Order granting this Motion. Additionally, the Parties agree that any new issues added to a subsequent petition for arbitration will be limited to issues that result from the Parties' negotiations relating to *USTA II* and its progeny.[64]

As explained below, nothing in this language obligates BellSouth to continue accepting new adds when the FCC has made it clear that no such obligation exists.

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[62] *See* Petition at p.6, ¶10. As the Joint Petitioners note, the Abeyance Agreement was "memorialized in a July 16, 2004 Joint Motion to Withdraw Petition for Arbitration." *See* Joint Motion to Withdraw Petition for Arbitration, *In the Matter of Joint Petition for Arbitration*, Docket No. 2004-42-C (July 16, 2004). The Commission approved this Joint Motion, stating that "[t]he parties are hereby allowed to withdraw their Petition, without prejudice, and under the terms stated in the Joint Motion to Withdraw." *See* Order Granting Joint Motion for Leave to Withdraw, *In the Matter of Joint Petition for Arbitration*, Order No. 2004-472 in Docket No. 2004-42-C at 2 (October 6, 2004).

[63] *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir. 2005)(*"USTA II"*).

[64] *See* Joint Motion to Withdraw Petition for Arbitration at pp. 2-3, ¶5.

1. The Abeyance Agreement is a Red Herring because, as explained above, the *TRRO's* New Add Provisions are Self-Effectuating.

Even if there were no dispute as to the scope of the Abeyance Agreement (which there clearly is), that agreement does not restrict BellSouth's rights under the *TRRO*. The Abeyance Agreement simply provides that the parties will continue to operate under their current Commission-approved interconnection agreements until they move into a new agreement (either via negotiated agreement or via arbitration pursuant to a subsequent petition for arbitration of a new interconnection agreement).[65] The parties are, in fact, continuing to operate under their current interconnection agreements and, like every party to all other existing interconnection agreements, the Joint Petitioners are no longer permitted to order new adds as UNEs pursuant to their current interconnection agreements. Simply put, the FCC trumped the parties' change of law obligations as well as any ancillary agreement, if one existed, regarding those obligations.[66] Consequently, the parties are relieved of those obligations in order to implement the *TRRO's* "no new adds" provisions. Thus, even accepting the Joint Petitioners' description and interpretation of the Abeyance Agreement (which BellSouth does not), that agreement does not impact BellSouth's rights under the *TRRO* for "new adds." [67]

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[65] *See, e.g.*, Petition at ¶29.

[66] *See* Section I above. *See also Cable & Wireless, P.L.C. v. FCC*, 166 F.3d 1224, 1231-32 (D.C. Cir. 1999) (*quoting Western Union Tel. Co. v. FCC*, 815 F.2d 1495, 1501 (D.C. Cir. 1987) ("For all contracts filed with the FCC, it is well-established that 'the Commission has the power to prescribe a change in contract rates when it finds them to be unlawful and to modify other provisions of private contracts when necessary to serve the public interest.'").

[67] If the Commission rejects this argument, there is no need to address the Abeyance Agreement argument at this time because there is no emergency.

2. The Parties Never Agreed to Expand the Abeyance Agreement to Include the *TRRO*.

The Joint Petitioners arguments would fail even if the FCC's no "new adds" requirement were not self-effectuating. Contrary to the Joint Petitioners' claims, the implementation of the *TRRO* simply is not covered by the Abeyance Agreement.

On June 15, 2004, the D.C. Circuit's stay of the *USTA II* decision expired. This expiration triggered the parties' change of law obligations in their existing agreements. Rather than exercise those obligations, in light of the on-going negotiations for a new agreement and the parties' pending arbitration, the parties agreed to withdraw the arbitration petition "in order to allow the parties to incorporate the negotiation of those issues precipitated by USTA II, as well as to continue to negotiate previously identified issues . . . ."[68] The parties further agreed that any new issues added to a subsequent petition for arbitration will be limited to issues that result from the Parties' negotiations relating to *USTA II* and its progeny."[69]

The Joint Petitioners ask the Commission to interpret this language to mean that eight months before the release of the *TRRO,* BellSouth voluntarily waived its right to amend its existing interconnection agreements with the Joint Petitioners for the *TRRO* or any other FCC Order that is tangentially related to *USTA II.* The crux of the Joint Petitioners' argument is that the parties cannot "continue to operate under the Parties' existing interconnection agreements until they are able to move into the arbitrated agreements that result from the upcoming arbitration docket" if the parties amend those agreements to incorporate the *TRRO.* Simply stated, the Joint Petitioners improperly read

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[68] Joint Motion to Withdraw Petition for Arbitration at p. 2, ¶5 (emphasis added).

[69] *Id.* At pp. 2-3, ¶5.

into the Joint Motion and the Abeyance Agreement a requirement that the rates, terms, and conditions of the Current Agreement were frozen as of June 30, 2004, until such time as the parties move onto the new arbitrated agreements. This interpretation is not only factually incorrect but also expressly rejected by the custom of the parties.

Indeed, there is nothing in the Joint Motion to Withdraw Petition for Arbitration or the Commission's Order granting that Motion that supports this interpretation. Further, it should be undisputed that the parties can and are continuing to operate under the Current Agreement until such time as the new arbitrated agreements become effective, even if certain provisions of the Current Agreement are modified to reflect changes of law. Additionally, as evidenced by recent amendment filings in Tennessee by NewSouth, NuVox, and BellSouth on February 22, 2005,[70] the custom of the parties is to amend the Current Agreement and to continue operating under the Current Agreement, as amended. Accordingly, the practice and custom of the parties is directly contrary to the arguments asserted by the Joint Petitioners and thus the Commission should reject them.[71]

Moreover, the express language of the Abeyance Agreement does not support the Joint Petitioners' interpretation. The Abeyance Agreement refers to "*USTA II* and its progeny." "Progeny" has a specific legal definition, and the Commission should give effect to this specific definition. Indeed, *Black's Law Dictionary* (2000 ed.) defines "progeny" as a "line of opinions that succeed a leading case <*Erie* and its progeny>."

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[70] Copies of these filings are attached as Exhibit D),

[71] *See Carter v. American Fruit Growers, Inc.*, 125 S.E. 641, 643 (S.C. 1924) ("Where the parties to a contract have given it a practical construction by their conduct as by acts in partial performance, such construction is entitled to great, if not controlling, weight in determining its proper interpretation.").

Accordingly, as used in the Joint Motion, "*USTA II* and its progeny" means opinions of a court or state commission reaffirming or restating the D.C. Circuit's vacatur of certain unbundling obligations in *USTA II*. The *TRRO* does neither. Rather, it is an administrative decision setting forth new rules and thus does not meet this legal definition of "progeny."

Unlike the Joint Petitioners' argument, this interpretation of the Abeyance Agreement is entirely consistent with the intent of the parties to limit their agreement to *USTA II*. The reason for this is clear: Because the parties agreed to incorporate *USTA II* issues into pending arbitrations, the agreement also encompassed any subsequent court or state commission decision making the same conclusions as did the D.C. Circuit in *USTA II*. To hold otherwise would frustrate the entire purpose of the Abeyance Agreement.

The use of the phrase "USTA II and its progeny" was no accident as the parties specifically negotiated and reached a compromise with this agreed-upon language while drafting the Joint Motion that was filed with the North Carolina Utilities Commission. In fact, the original draft of the Motion presented by the Joint Petitioners contained the phrase "post-USTA II regulatory framework" instead of "*USTA II* and its progeny."[72] In response, BellSouth struck the phrase "post-*USTA II* regulatory framework" and inserted "*USTA II*" because it was concerned that the Joint Petitioners' language was too broad as it could encompass the FCC's Final Rules (ultimately set forth in the *TRRO*), which was never the intent of the parties. *Id.* Accordingly, BellSouth proposed that the subject sentence should read: "With this framework, the Joint Petitioners and BellSouth have

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[72] *See* July 9, 2004 e-mail and attachment from counsel for BellSouth to counsel to Joint Petitioners. A copy is attached as Exhibit E.

agreed to avoid a separate/second process of negotiating/arbitrating change-of-law amendments to the current interconnection agreement based on *USTA II*." *Id.*

In the next draft, the Joint Petitioners reasserted the phrase "post-*USTA* II regulatory framework," which was still unacceptable to BellSouth.[73] Consequently, the parties discussed the impasse, wherein BellSouth specifically informed the Joint Petitioners of its concern with their language and the parties agreed to "*USTA II* and its progeny." This negotiation history definitively establishes that (1) BellSouth never agreed to the interpretation now set forth by the Joint Petitioners; (2) BellSouth expressly advised the Joint Petitioners that it objected to the interpretation that the Joint Petitioners are now espousing; and (3) the parties agreed to language to address BellSouth's concerns. The Joint Petitioners conveniently fail to disclose these facts, in obvious recognition of their fatal effect.

Adopting the Joint Petitioners' argument would lead to an absurd or unreasonable result as it would require this Commission to find that BellSouth indefinitely agreed to waive contractual rights related to the incorporation of the *TRRO* in the Current Agreement eight months prior to those changes even being issued. In effect, the Joint

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[73] Interestingly, under the Joint Petitioners' own interpretation, even the broader phrase "post-*USTA II* regulatory framework" does not result in the inclusion of the *TRRO* and the Final Rules that resulted. KMC, one of the Joint Petitioners, used this exact same phrase to mean solely the *USTA II* decision. Specifically, in filing a similar motion in North Carolina to postpone its pending arbitration proceeding with Sprint, KMC stated that the "Parties respectfully request that the Commission hold this proceeding in abeyance to provide additional time for the Parties to address the ***effect of the post-USTA II regulatory framework, the Interim Order, and the forthcoming unbundling rules on the terms, conditions and rates that should be included in the Agreement*** . . . ." *See* December 2, 2004 Motion at 2 (emphasis added)(copy attached as Exhibit F). This express inclusion of the *Interim Rules Order* and the *TRRO* proves that, at least KMC (and presumably all of the Joint Petitioners because their position on all the issues are allegedly the same) construes the phrase "post-*USTA II* regulatory framework to be limited to *USTA II* and does not encompass the FCC's *Interim Rules Order* or the *TRRO*.

Petitioners argue that BellSouth essentially gave up the right to implement those new rules for the Current Agreement even before any party knew what those rules would contain. Not only is this factually incorrect, but it also impermissibly leads to absurd and unreasonable results that only benefit the Joint Petitioners.[74]

D. If BellSouth Is Ordered To Provide New Adds After March 10, 2005, It Is Entitled To A Retroactive True-Up To An Appropriate Rate.

For all the reasons set forth in this Brief, BellSouth is not obligated to provide new adds after March 10, 2005. If, however, the Commission is inclined to grant Joint Petitioners any emergency relief (which it should not do), the Commission should rule that they must compensate BellSouth, in the event BellSouth ultimately prevails in its legal claim, for any former UNE added after March 10, 2005, in an amount equal to the difference in the rate paid by the CLEC and the appropriate rate BellSouth should have collected (either commercial or resale, depending on which service option the CLEC ultimately elects).

The retroactive payment is important not only as a legal matter but as a policy matter. The FCC was unequivocal in its holding that no CLEC is entitled to new adds after March 10, 2005. Short of an order denying the Joint Petitioner's complaint, the *only* way for the Commission to comply with the FCC's order is to require Joint Petitioners to pay BellSouth the difference between the UNE ratesand appropriate rates back to March 11, 2005.

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[74] *See Holden v. Alice Mfg. Inc., Co.* 452 S.E.2d 628, 631 (S.C. Ct. App. 1994)("A contract should receive sensible and reasonable construction and not such construction as will lead to absurd consequences or unjust results. Where one construction makes the provision unusual or extraordinary and another construction which is equally consistent with the language employed would make it reasonable, fair and just, the latter construction must prevail.").

A true-up is the only way to equalize the risk between the parties. If ordered to provision new adds after March 11, BellSouth unquestionably is bearing the risk associated with more months of complying with an unlawful unbundling regime; the Joint Petitioners should bear the risk of the true-up if their position is determined to be wrong. Without a true-up mechanism, BellSouth will lose, the CLECs who made alternative commercial arrangements for items that are no longer UNEs in compliance with the FCC's directive will lose, and facilities-based competition, which is impeded by impermissibly lenient unbundling standards will lose. The only parties that will benefit in the absence of a true-up are CLECs like the Joint Petitioners, who will receive this benefit by virtue of apparently having done nothing to develop a long-term business strategy. Simply put, if the Joint Petitioners are confident enough in their position to file this Petition, they should be willing to true-up the rates for new adds back to March 11, 2005.

V. ANSWER TO PETITION

BellSouth believes that is has fully addressed the allegations set forth in the Petition. In an abundance of caution, however, BellSouth briefly responds to the numbered paragraphs in the Petition as follows:

1. BellSouth is without knowledge or information sufficient to form a belief as to the truth of the allegations of Paragraphs 1, 2, and 3 of the Petition and, therefore, BellSouth denies those allegations.

2. BellSouth admits the allegations of Paragraph 4 of the Petition.

3. In response to Paragraphs 5, 6, and 7 of the Petition, BellSouth admits that the Commission has certain jurisdiction over BellSouth and the Joint Petitioners, but

BellSouth denies that the Commission has jurisdiction or authority to grant any of the relief sought in the Petition.

4. BellSouth admits the allegations of Paragraph 8 of the Petition.

5. The allegations of Paragraphs 9 of the Petition are matters of law that require no response from BellSouth. BellSouth denies these allegations to the extent that they are inconsistent with BellSouth's position as set forth in this Brief.

6. In response to Paragraph 10 of the Petition, BellSouth states that the Joint Motion to Withdraw Petition for Arbitration filed in Docket No. 2004-42-C speaks for itself, and BellSouth denies any allegations that are inconsistent with BellSouth's position as set forth in this Brief.

7. BellSouth admits the allegations of Paragraph 11 of the Petition.

8. The allegations of Paragraphs 12 through 15 of the Petition are matters of law that require no response from BellSouth. In an abundance of caution, BellSouth denies these allegations to the extent that they are inconsistent with BellSouth's position as set forth in this Brief.

9. In response to Paragraph 16 of the Petition, BellSouth admits that Exhibit 1 to the Petition is a copy of a Carrier Notification BellSouth issued on February 11, 2005 and that Exhibit 2 to the Petition is a copy of a Carrier Notification BellSouth issued on February 25, 2005. BellSouth denies the allegations of Paragraph 16 of the Petition to the extent that they are inconsistent with these Carrier Notifications.

10. In response to Paragraph 17 of the Petition, BellSouth admits that it filed a submission in Docket No. 2004-315-C on February 14, 2005. BellSouth denies the

allegations of Paragraph 17 of the Petition to the extent that they are inconsistent with that submission.

11. The allegations of Paragraphs 18 through 31 of the Petition are matters of law that require no response from BellSouth. In an abundance of caution, BellSouth denies these allegations to the extent that they are inconsistent with BellSouth's position as set forth in this Brief.

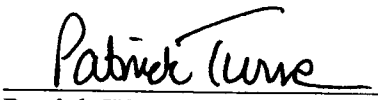
12. BellSouth denies that the Joint Petitioners are entitled to any relief sought in the "Prayer for Relief."

VI. CONCLUSION

For the reasons set forth therein, the Commission should deny all of the relief requested by the Joint Petitioners. If, however, the Commission requires BellSouth to accept orders for new adds after March 10, 2005, the Commission should order a retroactive true-up back to March 11, 2005.

Respectfully submitted, this 8th day of March 2005.

BELLSOUTH TELECOMMUNICATIONS, INC.



Patrick W. Turner
Suite 5200
1600 Williams Street
Columbia, South Carolina 29201
(803) 401-2900

575133

EXHIBIT A

BELLSOUTH

BellSouth Interconnection Services

675 West Peachtree Street, NE
Room 34S91
Atlanta, Georgia 30375

Jerry D. Hendrix
(404)-927-7503
Fax: (404) 529-7839

Sent Via E-mail and Certified Mail

February 25, 2005

Ms. Nanette Edwards
Director - Regulatory
ITC^DeltaCom
Suite 400, 7037 Old Madison Pike
Huntsville, Alabama 35806

Dear Ms. Edwards:

This is in response to your letter dated February 21, 2005, requesting assurances from BellSouth of its intent to comply with the terms of the existing Interconnection Agreements between BellSouth and ITC^DeltaCom Communications, Inc. ("DeltaCom") and Business Telecom, Inc. ("BTI") collectively DeltaCom/BTI[1] and to participate immediately in good-faith negotiations regarding the changes of law reflected in the Federal Communications Commission's (FCC) Triennial Review Remand Order (TRRO) that will become effective on March 11, 2005.

In accordance with the Parties' Interconnection Agreement, BellSouth welcomes the opportunity to negotiate amendments with all carriers to address changes of law including, but not limited to the recent transition period outlined in the TRRO, once it becomes effective on March 11, 2005. Although the terms of the Interconnection Agreements generally provide that we cannot issue change of law letters until the change of law becomes effective, BellSouth is certainly willing to meet with you or other CLECs at our earliest mutually convenient time to discuss the changes that need to be made to the Parties' Interconnection Agreements. As you note in your letter, BellSouth is currently preparing a proposed amendment incorporating the TRRO and will provide the proposed amendment to DeltaCom/BTI once it is completed. We hope to have the proposed amendment ready shortly. Parenthetically, I would also note that while we do not have a transcript that I am aware of from the conference call with the North Carolina Public Staff, which you do not identify, but which I believe to be the discussion that is the subject of your reference on page 4 of your letter, BellSouth did not make the statement that you attribute to Mr. Lackey. You and the other CLECs participating in the call were informed that BellSouth did not know when its amendment would be ready, not that it would not be ready before March 14, 2005. If you will look at the report that the North Carolina Public Staff sent to the North Carolina Utilities Commission (NCUC), March 14, 2005, was the proposed date for sending the change of law letters to CLECs, which is three days after we are legally permitted to provide notice under our interconnection agreement. This proposal seems entirely reasonable since March 11, 2005 is a Friday.

[1] ITC^DeltaCom has nine separate Agreements with BellSouth and BTI has one Agreement for all nine states. The Modification of Agreement Sections of the GTC's of these agreements varies regarding the provisions for the number of days for BellSouth to provide a proposed amendment from the initial request. In the ITC^DeltaCom Georgia Agreement, the provision is 30 calendar days from receipt of ITC^DeltaCom's initial request.

To avoid any confusion concerning DeltaCom/BTI's previous requests for negotiation dates from BellSouth outlined in Exhibit B attached to your letter, your December 20, 2004 e-mail asked for a time to negotiate changes based on the FCC's TRRO, before the TRRO was actually issued. You specifically asked for time during the week of January 11, 2005, and the TRRO was not released until February 4, 2005. Quite frankly, it is unclear how the parties would negotiate terms and conditions that had not yet been released, even if your request had not been premature on its face. With that said, BellSouth intends to negotiate a new agreement, as your letter requests and as the Interconnection Agreements allow, to include those recent changes in law, including but not limited to the TRRO, the Triennial Review Order (TRO) and the 252(i) Order[2]. Those changes in law, many of which were either affirmed by the D.C. Circuit or not appealed, have been in effect for more than one year, and BellSouth has been seeking for some time to make sure its Interconnection Agreements are consistent with those rules.

Turning to the more substantive parts of your letter, BellSouth disagrees with your statement "that if BellSouth undertakes the actions outlined in the carrier notice letter, then BellSouth is in breach of our existing interconnection agreements and in violation of the Order..." BellSouth will not breach its Interconnection Agreements, and BellSouth will not act unilaterally to modify its agreements. The FCC's actions in the TRRO clearly constitute a generic self-effectuating change for all Interconnection Agreements with regard to "new adds" for network elements that no longer must be unbundled pursuant to section 251 of the Act. BellSouth will, of course, negotiate all of the terms and conditions for changes that the FCC has required, although certain portions of the TRRO by their own terms have to be self-effectuating. Any suggestion that the FCC intended to allow carriers to add new UNE-P lines from March 11, 2005, until the time various interconnection agreements are actually amended would render meaningless the FCC's determination that there would be no "new adds" during the transition period.

In response to DeltaCom/BTI's discussion regarding high capacity loops and transport, BellSouth's Carrier Notification SN91085045, dated February 18, 2005, simply identifies for the benefit of the CLECs, the wire centers that satisfy the Tier 1, Tier 2, and Tier 3 criteria for dedicated transport and dark fiber transport as well as wire centers that satisfy the non-impairment thresholds for DS-1 and DS-3 loops. This Carrier Notification letter is in compliance with the TRRO and DeltaCom/BTI cannot ignore its message by hiding behind interconnection agreements that have been modified by the self-effectuating new rules discussed above that address the national public policy and the objectives of the Act. As the TRRO makes clear, it is for the FCC to determine where "no section 251(c) unbundling requirement exists," and thus, BellSouth's identification of these wire centers is clearly within the provisions of the Order to provide CLECs the necessary information to "undertake a reasonably diligent inquiry" prior to submitting an order. The Carrier Notification letter is in compliance with the TRRO and BellSouth will not accept orders from CLECs after March 11, 2005, that are not consistent with this list. Your comments about CLECs "self-certifying" their entitlement to various loop and transport UNEs overlooks the fact that DeltaCom is obligated, under the TRRO, to "undertake a reasonably diligent inquiry and, based on that inquiry, self-certify that, to the best of ....(your)...knowledge" that you are entitled to the UNEs your company is requesting. It is difficult to understand, in the face of BellSouth's filing with the FCC, how DeltaCom or any CLEC can claim that you have undertaken a reasonably diligent inquiry and self-certify that your company is entitled to certain UNEs in or between the offices BellSouth has identified.

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[2] FCC's Order released July 13, 2004 in Docket 01-338 ("Pick and Choose order")

DeltaCom has an obligation under the TRRO in this regard just as BellSouth does, and you cannot ignore the information that BellSouth has provided to the FCC.

If DeltaCom/BTI has any dispute about whether an ILEC has been relieved of its section 251(c) unbundling obligations in a particular wire center, it should raise that dispute with the FCC, as the extent of an ILEC's unbundling obligation must be decided by the FCC.

Please feel free to call me with any questions.

Sincerely,

Jerry Hendrix
Assistant Vice President, Interconnection Services

EXHIBIT B

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of	)	
	)	
Unbundled Access to Network Elements	)	WC Docket No. 04-313
	)	
Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers	)	CC Docket No. 01-338

ORDER ON REMAND

Adopted: **December 15, 2004** **Released:** **February 4, 2005**

By the Commission: Chairman Powell and Commissioner Abernathy issuing separate statements; Commissioner Martin issuing a separate statement at a later date; Commissioners Copps and Adelstein dissenting and issuing separate statements.

TABLE OF CONTENTS

I. INTRODUCTION

1. One of the major goals of Congress in enacting the Telecommunications Act of 1996 (1996 Act) was to open local telecommunications service markets to competition.[1] To that end, Congress imposed certain interconnection, resale, and network access requirements on incumbent local exchange carriers (LECs) through section 251 of the 1996 Act. Here, we focus on the market-opening provisions of section 251(c)(3), which require that incumbent LECs make elements of their networks available on an unbundled basis to new entrants at cost-based rates, pursuant to standards set out in section 251(d)(2).

[1] The 1996 Act amended the Communications Act of 1934, 47 U.S.C. § 151 *et seq.* We refer to these Acts collectively as the "Communications Act" or the "Act."

to all consumers, particularly small- and medium-sized enterprise customers. We believe that the impairment framework we adopt is self-effectuating, forward-looking, and consistent with technology trends that are reshaping the industry. As we recognize below, the long distance and wireless markets are sufficiently competitive for the Commission to decline to unbundle network elements to serve those markets. Our unbundling rules are designed to remove unbundling obligations over time as carriers deploy their own networks and downstream local exchange markets exhibit the same robust competition that characterizes the long distance and wireless markets.

4. The approach that we take here was helped immensely by the efforts of our state colleagues to develop evidence concerning the state of development of facilities-based competition in their respective states. The state commissions' impressive efforts to carry out the tasks set out for them in our *Triennial Review Order* led to the development of significant evidence of competitive deployment that we used to guide our impairment analysis. The evidence filed with us from those state proceedings provided more detailed evidence of competitive deployment than we have had before us in many past proceedings, and enabled us to draw reasonable inferences from such facilities deployment, as instructed by the D.C. Circuit, in developing the unbundling rules we adopt today. Likewise, the efforts of state commissions, as well as incumbent and competitive LECs, in seeking to develop batch hot cut processes in response to the *Triennial Review Order* have had pro-competitive results relevant to our present analysis.

II. EXECUTIVE SUMMARY

5. The executive summary of this Order is as follows:

- **Unbundling Framework.** We clarify the impairment standard adopted in the *Triennial Review Order* in one respect and modify our application of the unbundling framework in three respects. *First*, we clarify that we evaluate impairment with regard to the capabilities of a *reasonably efficient* competitor. *Second*, we set aside the *Triennial Review Order*'s "qualifying service" interpretation of section 251(d)(2), but prohibit the use of UNEs exclusively for the provision of telecommunications services in the mobile wireless and long distance markets, which we previously have found to be competitive. *Third*, in applying our impairment test, we draw reasonable inferences regarding the prospects for competition in one geographic market based on the state of competition in other, similar markets. *Fourth*, we consider the appropriate role of tariffed incumbent LEC services in our unbundling framework, and determine that in the context of the local exchange markets, a general rule prohibiting access to UNEs whenever a requesting carrier is able to compete using an incumbent LEC's tariffed offering would be inappropriate.

- **Dedicated Interoffice Transport.** Competing carriers are impaired without access to DS1 transport except on routes connecting a pair of wire centers, where both wire centers contain at least four fiber-based collocators or at least 38,000 business access lines. Competing carriers are impaired without access to DS3 or dark fiber transport except on routes connecting a pair of wire centers, each of which contains at least three fiber-based collocators or at least 24,000 business lines. Finally, competing carriers are not impaired without access to entrance facilities connecting an incumbent LEC's network with a competitive LEC's network in any instance. We adopt a 12-month plan for competing carriers to transition away from use of DS1- and DS3-capacity dedicated transport where they are not impaired, and an 18-month plan to govern transitions away from dark fiber transport. These transition plans apply only to the embedded customer base, and do not permit competitive LECs to add new dedicated transport UNEs in the absence of impairment. During the transition periods, competitive carriers will retain access to unbundled dedicated transport at a rate equal to the higher of (1) 115 percent of the rate the requesting carrier paid for the transport element on June 15, 2004, or (2) 115 percent of the rate

the state commission has established or establishes, if any, between June 16, 2004 and the effective date of this Order.

- **High-Capacity Loops.** Competitive LECs are impaired without access to DS3-capacity loops except in any building within the service area of a wire center containing 38,000 or more business lines and 4 or more fiber-based collocators. Competitive LECs are impaired without access to DS1-capacity loops except in any building within the service area of a wire center containing 60,000 or more business lines and 4 or more fiber-based collocators. Competitive LECs are not impaired without access to dark fiber loops in any instance. We adopt a 12-month plan for competing carriers to transition away from use of DS1- and DS3-capacity loops where they are not impaired, and an 18-month plan to govern transitions away from dark fiber loops. These transition plans apply only to the embedded customer base, and do not permit competitive LECs to add new high-capacity loop UNEs in the absence of impairment. During the transition periods, competitive carriers will retain access to unbundled facilities at a rate equal to the higher of (1) 115 percent of the rate the requesting carrier paid for the unbundled loops on June 15, 2004, or (2) 115 percent of the rate the state commission has established or establishes, if any, between June 16, 2004 and the effective date of this Order.

- **Mass Market Local Circuit Switching.** Incumbent LECs have no obligation to provide competitive LECs with unbundled access to mass market local circuit switching. We adopt a 12-month plan for competing carriers to transition away from use of unbundled mass market local circuit switching. This transition plan applies only to the embedded customer base, and does not permit competitive LECs to add new switching UNEs. During the transition period, competitive carriers will retain access to the UNE platform (*i.e.*, the combination of an unbundled loop, unbundled local circuit switching, and shared transport) at a rate equal to the higher of (1) the rate at which the requesting carrier leased that combination of elements on June 15, 2004, plus one dollar, or (2) the rate the state public utility commission establishes, if any, between June 16, 2004, and the effective date of this Order, for this combination of elements, plus one dollar.

III. BACKGROUND

6. The Communications Act requires that incumbent LECs provide unbundled network elements (UNEs) to other telecommunications carriers. In particular, section 251(c)(3) requires incumbent LECs to provide requesting telecommunications carriers with "nondiscriminatory access to network elements on an unbundled basis at any technically feasible point on rates, terms, and conditions that are just, reasonable, and nondiscriminatory in accordance with . . . the requirements of this section and section 252."[5] Section 251(d)(2) authorizes the Commission to determine which elements are subject to unbundling, and directs the Commission to consider, "at a minimum," whether access to proprietary network elements is "necessary," and whether failure to provide a non-proprietary element on an unbundled basis would "impair" a requesting carrier's ability to provide service.[6] Section 252, in turn, requires that those network elements that must be offered pursuant to section 251(c)(3) be made available at cost-based rates.[7] The Commission has previously summarized the long and complex history of our

[5] 47 U.S.C. § 251(c)(3).

[6] *See id.* § 251(d)(2).

[7] *See id.* § 252(d)(1). In the *Local Competition Order*, the Commission established the pricing methodology that state commissions must use to determine what are permissible cost-based rates incumbent LECs may charge for (continued....)

in which the elimination of UNEs had no effect on special access pricing. The record, however, reveals a dynamic market, in which elimination of UNEs would significantly risk increased special access pricing, undermining or destroying the ability to compete using tariffed alternatives.[188] The incumbent LECs' position thus would require continued review of special access pricing on a case-by-case basis – review that would necessitate investigation not only of the applicable tariffed rate but also of the relevant retail rates in the particular jurisdiction in which a particular competitor operates.[189] Moreover, this approach would call into question the availability of UNEs in any given situation at any given time, depending on the prices and terms on which tariffed alternatives were available, and the relevant retail rates, at that time. Thus, a rule barring access whenever competitors could operate using tariffed alternatives would destroy the market certainty necessary for sustainable, facilities-based competition using either UNEs *or* special access, thereby undermining the pro-competitive goals of the Act.[190] For these reasons, even in cases where carriers currently compete using special access, the rule urged by the incumbent LECs would raise insurmountable hurdles regarding administrability and would court the risk of incumbent abuse described above.

V. DEDICATED INTEROFFICE TRANSPORT

A. Summary

66. As explained below, we tailor our transport unbundling requirements narrowly to apply only where deployment of these facilities is not economic. Specifically, we adopt a test to identify three tiers of wire centers based on the number of business lines served and the presence of fiber-based collocations, which we use to assess economic conditions at wire centers. After classifying wire centers into three tiers, we then establish rules to evaluate impairment on transport routes connecting wire centers, according to tier, enabling us to assess impairment for DS1, DS3, and dark fiber transport. Based on the evidence in the record, we make the following determinations:

- *DS1 Transport.* We find that competing carriers are impaired without access to DS1 transport on all routes for which at least one end-point of the route is a wire center containing fewer than 38,000 business lines and fewer than four fiber-based collocators. Thus, competing carriers are not impaired without access to DS1 transport on routes connecting a pair of wire centers, each of which contains at least four fiber-based collocators *or* 38,000 or more business lines.

- *DS3 Transport.* We find that competing carriers are impaired without access to DS3 transport on all routes for which at least one end-point of the route is a wire center containing fewer than 24,000 business lines and fewer than three fiber-based collocators. Thus, competing carriers are not impaired without access to DS3 transport on routes connecting a pair of wire centers, each of which contains at least three fiber-based collocators *or* at least 24,000 business lines.

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[188] *See* AT&T Comments at 122-23 (claiming that the availability of UNEs has constrained incumbent LECs' ability to raise special access prices and citing recent significant increases in special access prices following the *USTA II* decision vacating the Commission's UNE rules); ALTS *et al.* Comments at 17, 29; MCI Reply at 111; Loop and Transport Coalition Comments at 51-52; XO Tirado Decl. at para. 50.

[189] As we explained above, we do not analyze impairment on a competitor-specific basis. *See, e.g.*, Part IV.A.

[190] *See* CompTel/ASCENT Comments at 23-24 (arguing that competitive carriers will not enter the market initially, nor be able to attract sufficient capital, if incumbent LECs are able to raise the price of essential inputs on short notice, or if impairment with respect to particular network elements fluctuates with special access pricing changes).

- *Dark Fiber Transport.* Like DS3 transport, we find that competing carriers are impaired without access to dark fiber transport on all routes for which at least one end-point of the route is a wire center containing fewer than 24,000 business lines and fewer than three fiber-based collocators. Thus, competing carriers are not impaired without access to dark fiber transport on routes connecting a pair of wire centers, each of which contains at least three fiber-based collocators *or* at least 24,000 business lines.

- *Entrance Facilities.* We find that competing carriers are not impaired without access to entrance facilities.

B. Background

67. Dedicated interoffice transmission facilities (dedicated transport or transport) are facilities dedicated to a particular competitive carrier that the carrier uses for transmission between or among incumbent LEC central offices and tandem offices, and to connect its local network to the incumbent LEC's network. The definition of dedicated transport adopted by the Commission in the *Triennial Review Order* was largely similar to that adopted in the Commission's prior orders. However, in the *Triennial Review Order*, the Commission narrowed the definition by limiting transport to transmission facilities between incumbent LEC wire centers or switches and by removing from the definition transmission between incumbent LEC wire centers or switches and those owned by requesting telecommunications carriers.[191] Although the *Triennial Review Order* required substantial transport unbundling nationwide, the Commission's unbundling analysis established mechanisms for state commissions to remove the unbundling obligation on a particular route if certain indicia of alternative transport deployment were evident.[192]

68. The D.C. Circuit in *USTA II* remanded the transport analysis the Commission conducted in the *Triennial Review Order* because, due to the improper delegation to state commissions vacated by the court, the Commission's findings of nationwide impairment for DS1, DS3, and dark fiber were inconsistent with the Commission's "frank[] acknowledg[ment] that competitive alternatives are available 'in some locations.'"[193] Moreover, the *USTA II* court faulted the Commission for not adequately considering where competitors could potentially deploy their own transport facilities.[194] In the *Interim Order and NPRM*, the Commission sought comment on how to analyze impairment for transport in light of the D.C. Circuit's admonitions. Importantly, the Commission sought comment on whether it should refine its unbundling analysis for transport by applying a more nuanced analysis based on service, geographic, or capacity distinctions.[195]

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[191] *Triennial Review Order*, 18 FCC Rcd at 17202-06, paras. 365-69.

[192] *Id.* at 17213-36, paras. 381-416.

[193] *USTA II*, 359 F.3d at 574.

[194] *Id.* at 574-75.

[195] *Interim Order and NPRM*, 19 FCC Rcd at 16788-90, paras. 8-11.

145. We do, however, adopt the *Interim Order and NPRM*'s proposal regarding transition pricing of unbundled dedicated transport facilities for which the Commission determines that no section 251(c) unbundling requirement exists.[407] Thus, during the relevant transition period, any dedicated transport UNEs that a competitive LEC leases as of the effective date of this Order, but for which the Commission determines that no section 251(c) unbundling requirement exists, shall be available for lease from the incumbent LEC at a rate equal to the higher of (1) 115 percent of the rate the requesting carrier paid for the transport element on June 15, 2004, or (2) 115 percent of the rate the state commission has established or establishes, if any, between June 16, 2004 and the effective date of this Order, for that transport element.[408] We believe that the moderate price increases help ensure an orderly transition by mitigating the rate shock that could be suffered by competitive LECs if TELRIC pricing were immediately eliminated for these network elements, while at the same time, these price increases, and the limited duration of the transition, provide some protection of the interests of incumbent LECs in those situations where unbundling is not required.[409] Of course, the transition mechanism adopted here is simply a default process, and pursuant to section 252(a)(1), carriers remain free to negotiate alternative arrangements superseding this transition period. The transition mechanism also does not replace or supersede any commercial arrangements carriers have reached for the continued provision of transport facilities or services.

VI. HIGH-CAPACITY LOOPS

A. Summary

146. In this section, we apply section 251(d)(2)(B) to incumbent LECs' DS1, DS3, and dark fiber loops, consistent with the requirements of *USTA II*. Specifically, we evaluate a requesting carrier's ability to utilize third-party alternatives to high-capacity loops, or to self-deploy such loops, to serve particular locations in an economic manner. Based on the evidence in the record, we make the following determinations:

- *DS3 Loops.* We find that requesting carriers are impaired without access to DS3-capacity loops at any location within the service area of an incumbent LEC wire center containing fewer than 38,000 business lines or fewer than four fiber-based collocators. Thus, requesting carriers are not impaired without access to DS3-capacity loops at any location within the service area of a wire center containing 38,000 or more business lines and four or more fiber-based collocators.

- *DS1 Loops.* We find that requesting carriers are impaired without access to DS1-capacity loops at any location within the service area of an incumbent LEC wire center containing fewer than 60,000 business lines or fewer than four fiber-based collocators. Thus, requesting carriers are not

[407] These transitional pricing requirements apply to DS1, DS3, and dark fiber dedicated transport links alike.

[408] *Interim Order and NPRM*, 19 FCC Rcd at 16797-99, para. 29. These prices apply to both lit and dark fiber transport. To the extent that a state public utility commission order raises some rates and lowers others for dedicated transport, the incumbent LEC may adopt either all or none of these dedicated transport rate changes. Dedicated transport facilities no longer subject to unbundling shall be subject to true-up to the applicable transition rate upon the amendment of the relevant interconnection agreements, including any applicable change of law processes.

[409] *See Interim Order and NPRM*, 19 FCC Rcd at 16799, para. 30.

impaired without access to DS1-capacity loops at any location within the service area of a wire center containing 60,000 or more business lines and four or more fiber-based collocators.

- *Dark Fiber Loops.* We find that requesting carriers are not impaired without access to unbundled dark fiber loops in any instance.

B. Background

147. As the Commission explained in the *Triennial Review Order*, loops are the transmission facilities between a central office and the customer's premises, *i.e.*, "the last mile" of a carrier's network that enables the end-user to originate and receive communications.[410] In distinguishing among the various types of loop facilities – voice grade (DS0/analog POTS), DS1, DS3, OCn and dark fiber[411] – the Commission has defined "high-capacity loops" as those of DS1 or higher capacity.[412]

148. In the *Triennial Review Order*, the Commission determined that competitive LECs were impaired without access to DS1, DS3, and dark fiber loops, subject to state commission implementation of "triggers" principally measuring the availability of actual alternatives or the feasibility of constructing such alternatives to a particular customer location, which could show that a competitor was not impaired without unbundled access to incumbent LEC facilities.[413] As we explained in the *Interim Order and NPRM*, the D.C. Circuit did not make a formal pronouncement regarding the status of the Commission's findings with respect to high-capacity loops, and although some carriers have argued that those rules have been vacated,[414] we have not taken a position on that question.[415] Nevertheless, the Commission sought comment on how best to respond to the D.C. Circuit's *USTA II* decision concerning application of the impairment standard to high-capacity loops. In recognition of the fact that continued disputes over *USTA II*'s implications for our high-capacity loop unbundling rules would give rise to uncertainty and thus instability in the market, we take this opportunity to revisit those rules here.

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[410] *Triennial Review Order*, 18 FCC Rcd at 17105, para. 203.

[411] *Id.* at 17012, para. 45.

[412] *Id.* at 17012, 17106, paras. 45, 204.

[413] *Id.* at 17164-84, paras. 311-42. The *Triennial Review Order* established two types of triggers to evaluate impairment of high-capacity loops: (1) a two wholesaler trigger (for DS1 and DS3 loops); and (2) a two self-provisioner trigger (for DS3 and dark fiber loops).

[414] *See, e.g.*, Letter from Jerry Hendrix, Assistant Vice President Interconnection Services, BellSouth, to Stephen G. Huels, Regional Vice President, AT&T (Apr. 30, 2004), *in* Letter from David Lawson, Counsel for AT&T, to Marlene H. Dortch, Secretary, FCC, WC Docket No. 01-338 at attach. 7 (filed May 7, 2004) ("The D.C. Circuit Order explicitly vacated the Federal Communications Commission's (FCC) national impairment finding for DS1, DS3 and dark fiber elements. As a result, once vacatur becomes effective, ILECs will no longer have an obligation under Section 251 of the Act to offer these elements and, at that time, BellSouth will pursue the legal and regulatory options available to it."); Verizon Reply, CC Docket Nos. 01-338, 96-98, 98-147 at 5 (filed Apr. 5, 2004) ("Once the mandate in *USTA II* issues, ILECs will have no obligation to make high-capacity facilities available on an unbundled basis at all.").

[415] *USTA II*, 359 F.3d at 571-73; *Interim Order and NPRM*, 19 FCC Rcd at 16788, para. 9 (assuming *arguendo* that the D.C. Circuit vacated the Commission's enterprise market loop unbundling rules).

for dark fiber loops.[523] We expect that the extra time is necessary to permit carriers the time necessary to migrate to alternative fiber arrangements, including self-deployed fiber.

198. We adopt the *Interim Order and NPRM*'s proposal regarding transition pricing of unbundled high-capacity loops for which the Commission determines that no section 251(c) unbundling requirement exists. Thus, during the relevant transition period, any high-capacity loop UNEs that a competitive LEC leases as of the effective date of this Order, but for which the Commission determines that no section 251(c) unbundling requirement exists, shall be available for lease from the incumbent LEC at a rate equal to the higher of (1) 115 percent of the rate the requesting carrier paid for the loop element on June 15, 2004, or (2) 115 percent of the rate the state commission has established or establishes, if any, between June 16, 2004 and the effective date of this Order, for that loop element.[524] We believe that the moderate price increases help ensure an orderly transition by mitigating the rate shock that could be suffered by competitive LECs if TELRIC pricing were immediately eliminated for these network elements, while at the same time, these price increases, and the limited duration of the transition (which will require current UNE purchasers to more quickly make new service arrangements), provide significant protection of the interests of incumbent LECs in those situations where unbundling is not required.[525] Of course, the transition mechanism adopted here is simply a default process, and pursuant to section 252(a)(1), carriers remain free to negotiate alternative arrangements superseding this transition period. The transition mechanism also does not replace or supersede any commercial arrangements carriers have reached for the continued provision of high-capacity loop facilities or services.

VII. MASS MARKET LOCAL CIRCUIT SWITCHING

A. Summary

199. We reexamine incumbent LECs' obligations to unbundle mass market local circuit switching in light of the D.C. Circuit's vacatur of our previous rules. In particular, we have revised our approach to impairment pursuant to *USTA II*'s instruction to draw appropriate inferences about potential competition in one market from evidence of competitive deployment in another market. Applying the court's guidance to the record before us, we impose no section 251 unbundling requirement for mass market local circuit switching nationwide.[526] We conclude, based on the record here, and the reasonable inferences we draw from it, that competitive LECs not only have deployed a significant, growing number of their own switches, often using new, more efficient technologies such as packet switches, but also that they are able

[523] Thus, for dark fiber loops, carriers have eighteen months from the effective date of this Order to modify their interconnection agreements, including completing any change of law processes. At the end of the eighteen-month period, requesting carriers must transition the affected dark fiber loop UNEs to alternative facilities or arrangements.

[524] *Interim Order and NPRM*, 19 FCC Rcd at 16797-99, para. 29. These prices apply to DS1, DS3, and dark fiber loops. To the extent that a state public utility commission order raises some rates and lowers others for high-capacity loops, the incumbent LEC may adopt either all or none of these high-capacity loop rate changes. High-capacity loops no longer subject to unbundling shall be subject to true-up to the applicable transition rate upon the amendment of the relevant interconnection agreements, including any applicable change of law processes.

[525] *See id.* at 16799, para. 30.

[526] Competitive LECs have used unbundled local circuit switching exclusively in combination with incumbent LEC loops and shared transport in an arrangement known as the unbundled network element platform (UNE-P).

to use those switches to serve the mass market in many areas, and that similar deployment is possible in other geographic markets. Additionally, we find that the BOCs have made significant improvements in their hot cut processes that should better situate them to perform larger volumes of hot cuts ("batch hot cuts") to the extent necessary.[527] We find that these factors substantially mitigate the *Triennial Review Order*'s stated concerns about circuit switching impairment. Moreover, regardless of any limited potential impairment requesting carriers may still face, we find that the continued availability of unbundled mass market switching would impose significant costs in the form of decreased investment incentives, and therefore we conclude not to unbundle pursuant to section 251(d)(2)'s "at a minimum" authority. Finally, we adopt a transition plan that requires competitive LECs to submit orders to convert their UNE-P customers to alternative arrangements within twelve months of the effective date of this order. This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching. During the twelve-month transition period, which does not supersede any alternative arrangements that carriers voluntarily have negotiated on a commercial basis, competitive LECs will continue to have access to UNE-P priced at TELRIC plus one dollar until the incumbent LEC successfully migrates those UNE-P customers to the competitive LECs' switches or to alternative access arrangements negotiated by the carriers.[528]

B. Background

200. In prior orders addressing the unbundling of network elements, the Commission concluded that incumbent LECs must provide access to unbundled local switching and defined the switching element to include "line-side facilities," "trunk-side facilities," and all the features, functions, and capabilities of the local circuit switch.[529] As noted above, competitors have used unbundled local circuit switching exclusively in combination with incumbent LEC loops and shared transport in an arrangement

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[527] A hot cut is a largely manual process requiring incumbent LEC technicians to manually disconnect the customer's loop, which was hardwired to the incumbent LEC switch, and physically re-wire it to the competitive LEC switch, while simultaneously reassigning (*i.e.*, porting) the customer's original telephone number from the incumbent LEC switch to the competitive LEC switch. *Triennial Review Order*, 18 FCC Rcd at 17266, para. 465 n.1409. Since the *Triennial Review Order* was adopted, major users of UNE-P, such as AT&T, have announced that they are abandoning that method of entry into the mass market in favor of alternatives such as VoIP, thus reducing the likely volume of hot cuts required in the absence of unbundled local circuit switching.

[528] Because this Order modifies our unbundling framework and adopts new rules applicable to unbundled local switching, we dismiss as moot the petition for reconsideration filed on October 2, 2003 by NASUCA that asked the Commission to reconsider various aspects of the impairment standard and unbundled local switching rules adopted in the *Triennial Review Order*. *See* National Association of State Utility Consumer Advocates Petition for Reconsideration, CC Docket Nos. 01-338, 96-98, 98-147 (filed Oct. 2, 2003).

[529] *See Local Competition Order*, 11 FCC Rcd at 15706, para. 412. We retain the *Triennial Review Order*'s definition of local circuit switching to encompass line-side and trunk-side facilities, plus the features, functions, and capabilities of the switch, which was not challenged in the D.C. Circuit or in this proceeding. *Triennial Review Order*, 18 FCC Rcd at 17245-46, para. 433; 47 C.F.R. § 51.319(c)(1). We likewise readopt here the definitions of "operator services" and "directory assistance" set forth in the *UNE Remand Order*, and readopted in the *Triennial Review Order*. *Triennial Review Order*, 18 FCC Rcd at 17246, para. 433 n.1326 (citing *UNE Remand Order*, 15 FCC Rcd at 3892, para. 443). To the extent that unbundling of shared transport, signaling, and call-related databases were contingent upon the unbundling of local circuit switching in the *Triennial Review Order*, the availability of those elements on an unbundled basis continue to rise or fall with the availability of unbundled local circuit switching. *See Triennial Review Order*, 18 FCC Rcd at 17319-20, 17323-34, paras. 533-34, 542-60.

special access facilities.[650] Under these circumstances, as the *USTA II* court recognized, imposition of a bar on conversions would give rise to "anomalies, as CLECs hitherto relying on special access might be barred from access to EELs as unbundled elements, while a similarly situated CLEC that had just entered the market would not be barred."[651]

232. Finally, we decline to prohibit conversions because of the line-drawing and administrative difficulties such a prohibition would create. A "no conversions" rule would require us to evaluate the relationships between and among a series of distinct transactions between a competitor and an incumbent LEC. For example, a carrier seeking to evade such a ban could argue that its order of a UNE did not constitute a conversion when it was not coincident with cancellation of the associated special access circuit, or when the UNE ordered and the tariffed offering surrendered were sufficiently distinct in functionality. AT&T points out that a rule prohibiting conversions would create numerous disputes over whether a customer contract reflects a new order or a renewal.[652] Qwest implicitly acknowledges the problems inherent in administering a conversion ban, advocating a carrier-specific approach to disallowing conversions, and seeking complementary rules that would prohibit the disconnection of a special access circuit and reactivation of a circuit which duplicates its function within 90 days.[653] Given the logistical challenges of creating a regime where specific carriers are entitled to particular circuits for specific periods of time, we find these regulations antithetical to our revised framework and too burdensome to adopt.

B. Implementation of Unbundling Determinations

233. We expect that incumbent LECs and competing carriers will implement the Commission's findings as directed by section 252 of the Act.[654] Thus, carriers must implement changes to their interconnection agreements consistent with our conclusions in this Order.[655] We note that the failure of an incumbent LEC or a competitive LEC to negotiate in good faith under section 251(c)(1) of the Act and our implementing rules may subject that party to enforcement action. Thus, the incumbent LEC and competitive LEC must negotiate in good faith regarding any rates, terms, and conditions necessary to implement our rule changes.[656] We expect that parties to the negotiating process will not unreasonably delay implementation of the conclusions adopted in this Order. We encourage the state commissions to monitor this area closely to ensure that parties do not engage in unnecessary delay.

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[650] For the reasons we discuss here, we disagree with the BOCs' assertion that our rule permitting conversions amounts to nothing more than a transfer of wealth from incumbent LECs to competitive LECs. *See, e.g.*, Verizon Comments at 78; BellSouth Dec. 7, 2004 Special Access *Ex Parte* Letter at 5. On the contrary, permitting conversions where requesting carriers are impaired and, thus, legally entitled to UNEs, ensures that competitive LECs are able to obtain network elements at prices that allow them to compete, as envisioned by the 1996 Act.

[651] *USTA II*, 359 F.3d at 593.

[652] AT&T Comments at 141.

[653] Qwest Reply at 66-67. Qwest would also bar a competitor purchasing a special access circuit from obtaining a UNE along a parallel circuit. *Id.*

[654] 47 U.S.C. § 252.

[655] *Id.*

[656] 47 U.S.C. § 251(c)(1); 47 U.S.C. § 252(b)(5).

234. We recognize that our rules governing access to dedicated transport and high-capacity loops evaluate impairment based upon objective and readily obtainable facts, such as the number of business lines or the number of facilities-based competitors in a particular market.[657] We therefore hold that to submit an order to obtain a high-capacity loop or transport UNE, a requesting carrier must undertake a reasonably diligent inquiry and, based on that inquiry, self-certify that, to the best of its knowledge, its request is consistent with the requirements discussed in parts IV, V, and VI above and that it is therefore entitled to unbundled access to the particular network elements sought pursuant to section 251(c)(3).[658] Upon receiving a request for access to a dedicated transport or high-capacity loop UNE that indicates that the UNE meets the relevant factual criteria discussed in sections V and VI above, the incumbent LEC must immediately process the request. To the extent that an incumbent LEC seeks to challenge any such UNEs, it subsequently can raise that issue through the dispute resolution procedures provided for in its interconnection agreements.[659] In other words, the incumbent LEC must provision the UNE and subsequently bring any dispute regarding access to that UNE before a state commission or other appropriate authority.[660]

IX. PROCEDURAL MATTERS

A. Effective Date of Rules

235. Given the need for prompt action, the requirements set forth here shall take effect on March 11, 2005, rather than 30 days after publication in the Federal Register. Commission rules permit us to render an order effective sooner than 30 days after publication in the Federal Register where good cause exists.[661] Similarly, section 553(d) of the Administrative Procedures Act (APA)[662] permits any

[657] *See supra* Parts V.C.2, VI.C.2.

[658] As in the past, we do not believe it is necessary to address the precise form that such a certification must take, but we note that a letter sent to the incumbent LEC by a requesting carrier is a practical method of certification. *See Triennial Review Order*, 18 FCC Rcd at 17369, para. 624; *Supplemental Order Clarification*, 15 FCC Rcd at 9602-03, para. 29. Although we again decline to adopt specific record-keeping requirements, we expect that requesting carriers will maintain appropriate records that they can rely upon to support their local usage certification. *See Triennial Review Order*, 18 FCC Rcd at 17370, para. 629; *Supplemental Order Clarification*, 15 FCC Rcd at 9604, para. 32.

[659] We do not adopt auditing rules for the self-certifications relating to our impairment rules for dedicated transport and high-capacity loops. We decline to adopt an auditing requirement because, in contrast to EELs self-certifications, the requesting carrier seeking access to the UNE certifies only to the best of its knowledge, and is unlikely to have in its possession all information necessary to evaluate whether the network element meets the factual impairment criteria in our rules. However, these rules do not supersede any audit rights included in any interconnection agreements or other commercial arrangements. *See, e.g., Supplemental Order Clarification*, 15 FCC Rcd at 9604, para. 32 (noting that some interconnection agreements contain audit rights). Further, we retain our existing certification and auditing rules governing access to EELs. *See* 47 C.F.R. § 51.318.

[660] Of course, this mechanism for addressing incumbent LEC challenges to self-certifications is simply a default process, and pursuant to section 252(a)(1), carriers remain free to negotiate alternative arrangements. 47 U.S.C. § 252(a)(1).

[661] *See* 47 C.F.R. §§ 1.103(a), 1.427(b).

[662] 5 U.S.C. § 500 *et seq.*

EXHIBIT C

BellSouth Telecommunications, Inc.
Legal Department
1600 Williams Street
Suite 5200
Columbia, SC 29201

patrick.turner@bellsouth.com

Patrick W. Turner
General Counsel-South Carolina

803 401 2900
Fax 803 254 1731

February 14, 2005

Mr. Charles Terreni
Chief Clerk of the Commission
Public Service Commission of South Carolina
Post Office Drawer 11649
Columbia, South Carolina 29211

Re: Re: Petition to Establish Generic Docket to Consider Amendments to Interconnection Agreements Resulting From Changes of Law
Docket No. 2004-316-C

Dear Mr. Terreni:

Enclosed for filing are the original and ten copies of a Notice of Submission in the above-referenced matter. By copy of this letter, BellSouth is serving this Notice on all parties of record to this docket.

Sincerely,

Patrick Turner

Patrick W. Turner

PWT/nml
Enclosure
cc: All Parties of Record

PC Docs #572182

BEFORE THE
PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

In Re:	)	
	)	Docket No. 2004-316-C
Petition to Establish Generic Docket to	)	
Consider Amendments to Interconnection	)	
Agreements Resulting From Changes of Law	)	
	)	

NOTICE OF SUBMISSION

BellSouth Telecommunications, Inc. ("BellSouth") respectfully notifies the Public Service Commission of South Carolina and the parties to this docket of the attached letter submitted to the Chief Clerk of the Commission.

Respectfully submitted this the 14th day of February, 2005.

BELLSOUTH TELECOMMUNICATIONS, INC.

Patrick W. Turner

Patrick W.Turner
Suite 5200
1600 Williams Street
Columbia, South Carolina 29201
(803) 401-2900

PC Docs # 572155

BELLSOUTH

Cindy Cox
Vice President
Business Development and Governmental Relations

Suite 5470
1600 Williams Street
Post Office Box 752
Columbia, South Carolina 29201
803 401-2252
FAX 803 771-4680

February 14, 2005

Mr. Charles Terreni
Chief Clerk of the Commission
Public Service Commission of South Carolina
Post Office Drawer 11649
Columbia, South Carolina 29211

Re: FCC's *Triennial Review Remand Order*

Dear Mr. Terreni:

On February 4, 2005, the Federal Communications Commission ("FCC") released its permanent unbundling rules in its *Triennial Review Remand Order* ("*TRRO*").[1] As discussed in the attached Carrier Notification Letter that BellSouth posted on its website on the afternoon of February 11, 2005, the FCC identified a number of former unbundled network elements ("UNEs") that will no longer be available as of March 11, 2005, except as provided in the *TRRO*. The FCC adopted transition plans to move the embedded base of former UNEs to alternate serving arrangements and provided that the transition period for the former UNEs (loops, transport, and switching) would commence on March 11, 2005. The FCC made clear its intent for carriers to include the transition plans regarding the embedded base in existing interconnection agreements through appropriate change of law provisions and provided for a true-up of rates back to the effective date of the *TRRO* to reflect price increases that were approved by the FCC.

With regard to each of the former UNEs, however, the FCC provided that no "new adds" would be allowed as of March 11, 2005. *See TRRO* at ¶227. The *TRRO's* provisions as to "new adds" constitute a generic self-effectuating change for all interconnection agreements, and they are effective March 11, 2005, without the necessity

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[1] In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers, WC Docket No. 04-313 and CC Docket No. 01-338, *Order on Remand*, FCC 04-290 (released February 4, 2005) (*"TRRO"*) (available at http://hraunfoss.fcc.gov/edocs_public/attachmatch/FCC-04-290A1.pdf).

of formal amendments to any existing interconnection agreements. See Attached Letter at p.2.

In accordance with the terms of the *TRRO*, and as set out in more detail in the attached letter, BellSouth has informed its carrier customers that, effective March 11, 2005, BellSouth will no longer accept orders that treat the affected items as UNEs. BellSouth has further informed those customers that, as of March 11, 2005, it is no longer required to provide high capacity UNE loops in certain central offices, to provide UNE transport between certain central offices, or to provide new UNE dark fiber loops or UNE entrance facilities.

At the same time we are delivering this letter, we are also filing a copy of this letter and its attachment in Docket No. 2004-316-C and serving a copy of that filing on all parties to that docket.

Sincerely,

Cindy Cox

Cindy Cox

572068

BELLSOUTH

BellSouth Interconnection Services
675 West Peachtree Street
Atlanta, Georgia 30375

Carrier Notification
SN91085039

Date: February 11, 2005

To: Competitive Local Exchange Carriers (CLEC)

Subject: CLECs – (Product/Service) – Triennial Review Remand Order (TRRO) - Unbundling Rules

On February 4, 2005, the Federal Communications Commission (FCC) released its permanent unbundling rules in the Triennial Review Remand Order (TRRO).

The TRRO has identified a number of former unbundled network elements ("UNEs") that will no longer be available as of March 11, 2005, except as provided in the TRRO. These former UNEs include all switching[1], as well as certain high capacity loops in specified central offices[2], and dedicated transport between a number of central offices having certain characteristics,[3] as well as dark fiber[4] and entrance facilities[5].

The FCC, recognizing that it removed significant unbundling obligations formerly placed on incumbent local exchange carriers (ILEC), adopted transition plans to move the embedded base of these former UNEs to alternative serving arrangements.[6] The FCC provided that the transition period for each of these former UNEs (loops, transport and switching), would commence on March 11, 2005.[7] The FCC made provisions to include these transition plans in existing interconnection agreements through the appropriate change of law provisions. It also provided that rates for these former UNEs during the transition period would be trued up back to the effective date of the TRRO to reflect the increases in the prices of those former UNEs that were approved by the FCC in the TRRO.

The FCC took a different direction with regard to the issue of "new adds" involving these former UNEs. With regard to each of the former UNEs the FCC identified, the FCC provided that no "new adds" would be allowed as of March 11, 2005, the effective date of the TRRO. For instance, with regard to switching, the FCC said, "This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new customers using unbundled access to local circuit switching."[8] The FCC also said "This transition period shall apply only to the embedded customer base, and does not permit competitive LECs to add new UNE-P arrangements using unbundled access to local circuit switching pursuant to section 251 (c)(3) except as otherwise specified in this Order." (footnote omitted)[9]

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[1] TRRO, ¶199
[2] TRRO, ¶¶174 (DS3 loops), 178 (DS1 loops)
[3] TRRO, ¶¶126 (DS1 transport), 129 (DS3 transport),
[4] TRRO, ¶¶133 (dark fiber transport), 182 (dark fiber loops)
[5] TRRO, ¶141
[6] TRRO, ¶¶142 (transport), 195 (loops), 226 (switching)
[7] TRRO, ¶¶143 (transport), 196 (loops) 227 (switching)
[8] TRRO, ¶199
[9] TRRO, ¶227

The FCC clearly intended the provisions of the TRRO related to "new adds" to be self-effectuating. First, the FCC specifically stated that "Given the need for prompt action, the requirements set forth herein shall take effect on March 11, 2005.. .."[10] Further, the FCC specifically stated that its order would not "...supersede any alternative arrangements that carriers voluntarily have negotiated on a commercial basis...,"[11] but made no such finding regarding existing interconnection agreements. Consequently, in order to have any meaning, the TRRO's provisions regarding "new adds" must be effective March 11, 2005, without the necessity of formal amendment to any existing interconnection agreements. Therefore, while BellSouth will not breach its interconnection agreements, nor act unilaterally to modify its agreements, the FCC's actions clearly constitute a generic self-effectuating change for all interconnection agreements with regard to "new adds" for these former UNEs.

Thus, pursuant to the express terms of the TRRO, effective March 11, 2005, for "new adds," BellSouth is no longer required to provide unbundled local switching at Total Element Long Run Incremental Cost ("TELRIC") rates or unbundled network platform ("UNE-P") and as of that date, BellSouth will no longer accept orders that treat those items as UNEs.

Further, effective March 11, 2005, BellSouth is no longer required to provide high capacity UNE loops in certain central offices or to provide UNE transport between certain central offices. As of that date, BellSouth will no longer accept orders that treat these items as UNEs, except where such orders are certified pursuant to paragraph 234 of the TRRO. In addition, as of March 11, 2005 BellSouth is no longer required to provide new UNE dark fiber loops or UNE entrance facilities under any circumstances and we will not accept orders for these former UNEs.

Prior to the effective date of the TRRO, BellSouth will provide comprehensive information to CLECs regarding those central offices where UNE DS1 and DS3 loops are no longer available, and the routes between central offices where UNE DS1, DS3 and dark fiber transport are no longer available.

CLECs will continue to have several options involving switching, loops and transport available to serve their new customers. To this end, with regard to the combinations of switching and loops that constituted UNE-P, BellSouth is offering CLECs these options:

- Short Term (6 month) Commercial Agreement to provide a bridge between the effective date of the Order and the negotiation of a longer term commercial agreement,
- Long Term Commercial Agreement (3 years, effective January 1, 2005, with transitional discounts available under those agreements executed by March 10, 2005)

In addition, most CLECs, if not all, already have the option of ordering these former UNEs, and particularly the combination of loops and switching, as resale, pursuant to existing interconnection agreements.

To be clear, in the event one of the above options is not selected and a CLEC submits a request for new UNE-P on March 11, 2005 or after, the order will be returned to the CLEC for clarification and resubmission under one of the available options set forth above. CLECs that have already signed a Commercial Agreement may continue to request new service pursuant to their Commercial Agreement.

With regard to the former high capacity loop and transport UNEs, including dark fiber and entrance facilities, that BellSouth is no longer obligated to offer, BellSouth has two options for CLECs to consider. Specifically, CLECs may either elect to order resale of BellSouth's Private Line Services or alternatively, may request Special Access service in lieu of the former TELRIC-priced UNEs. Any orders submitted for new unbundled high capacity loops and unbundled dedicated interoffice transport

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[10] TRRO ¶235

[11] TRRO ¶199 Also see ¶ 198

in those non-impaired areas after March 11, 2005, without the required certifications, will be returned to the CLEC for clarification and resubmission under one of the above options.

To obtain more information about this notification, please contact your BellSouth contract negotiator.

Sincerely,

ORIGINAL SIGNED BY JERRY HENDRIX

Jerry Hendrix – Assistant Vice President
BellSouth Interconnection Services

STATE OF SOUTH CAROLINA)
) CERTIFICATE OF SERVICE
COUNTY OF RICHLAND)

The undersigned, Nyla M. Laney, hereby certifies that she is employed by the Legal Department for BellSouth Telecommunications, Inc. ("BellSouth") and that she has caused BellSouth Telecommunications, Inc.'s Letter of Submission in Docket No. 2004-316-C to be served upon the following this February 14, 2005:

Florence P. Belser, Esquire
General Counsel
Post Office Box 11263
Columbia, South Carolina 29211
(Office of Regulatory Staff)
(U. S. Mail and Electronic Mail)

Stan Bugner
State Director
1301 Gervais Street
Suite 825
Columbia, South Carolina 29201
(Verizon)
(U. S. Mail and Electronic Mail)

Steven W. Hamm, Esquire
C. Jo Anne Wessinger Hill, Esquire
Richardson, Plowden, Carpenter & Robinson, P.A.
1600 Marion Street
Post Office Box 7788
Columbia, South Carolina 29202
(Verizon)
(U. S. Mail and Electronic Mail)

Jocelyn G. Boyd, Esquire
Staff Attorney
S. C. Public Service Commission
Post Office Box 11649
Columbia, South Carolina 29211
(PSC Staff)
(U. S. Mail and Electronic Mail)

F. David Butler, Esquire
General Counsel
S. C. Public Service Commission
Post Office Box 11649
Columbia, South Carolina 29211
(PSC Staff)
(U. S. Mail and Electronic Mail)

Robert E. Tyson, Jr., Esquire
Sowell Gray Stepp & Laffitte
1310 Gadsden Street
Columbia, South Carolina 29211
(ITC^Delta Com Communications, Inc.)
(U. S. Mail and Electronic Mail)

Kennard B. Woods, Esquire
MCI
Law and Public Policy
6 Concourse Parkway, Suite 600
Atlanta, Georgia 30328
(U. S. Mail and Electronic Mail)

M. John Bowen, Jr., Esquire
Margaret M. Fox, Esquire
McNair Law Firm, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
(SCTC)
(U. S. Mail and Electronic Mail)

William Atkinson, Esquire
Attorney, State Regulatory
3065 Cumberland Circle
Mailstop GAATLD0602
Atlanta, Georgia 30339
(United Telephone Company of the Carolinas and
Sprint Communications Company, L.P.)
(U. S. Mail and Electronic Mail)

Russell B. Shetterly, Esquire
P. O. Box 8207
Columbia, South Carolina 29202
(Knology of Charleston and Knology of
South Carolina, Inc.)
(U. S. Mail and Electronic Mail)

Jack Derrick
Attorney
141111 Capital Blvd.
Wake Forest, NC 27587-5900
(Sprint/United Telephone)
(U. S. Mail and Electronic Mail)

Darra W. Cothran, Esquire
Woodward, Cothran & Herndon
1200 Main Street, 6th Floor
Post Office Box 12399
Columbia, South Carolina 29211
(MCI WorldCom Network Service, Inc.
MCI WorldCom Communications and
MCImetro Access Transmission Services, Inc.)
(U. S. Mail and Electronic Mail)

John J. Pringle, Jr., Esquire
Ellis Lawhorne & Sims, P.A.
Post Office Box 2285
Columbia, South Carolina 29202
(AT&T)
(U. S. Mail and Electronic Mail)

Marsha A. Ward, Esquire
Kennard Woods, Esquire
MCI WorldCom, Inc.
Law and Public Policy
6 Concourse Parkway, Suite 3200
Atlanta, Georgia 30328
(MCI)
(U. S. Mail and Electronic Mail)

Frank R. Ellerbe, Esquire
Bonnie D. Shealy, Esquire
Robinson, McFadden & Moore, P.C.
1901 Main Street, Suite 1200
Post Office Box 944
Columbia, South Carolina 29202
(South Carolina Cable Television Association)
(U. S. Mail and Electronic Mail)

Genevieve Morelli
Kelley, Drye & Warren, LLP
1200 19th Street, N.W.
Washington, D.C. 20036
(KMC Telecom III, Inc.)
(U. S. Mail and Electronic Mail)

John D. McLaughlin, Jr.
Director, State Government Affairs
KMC Telecom, Inc.
1755 North Brown Road
Lawrenceville, GA 30043
(KMC Telecom)
(U. S. Mail and Electronic Mail)

Scott A. Elliott, Esquire
Elliott & Elliott
721 Olive Street
Columbia, South Carolina 29205
(Sprint/United Telephone)
(U. S. Mail and Electronic Mail)

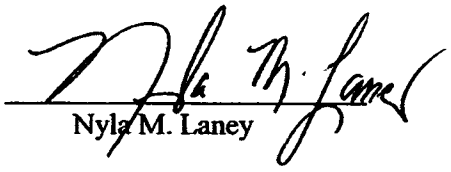
Marty Bocock, Esquire
Director of Regulatory Affairs
1122 Lady Street, Suite 1050
Columbia, South Carolina 29201
(Sprint/United Telephone Company)
(U. S. Mail and Electronic Mail)

Faye A. Flowers, Esquire
Parker Poe Adams & Bernstein LLP
1201 Main Street, Suite 1450
Columbia, South Carolina 29202
(US LEC of South Carolina and Southeastern Competitive Carriers Association)
(U. S. Mail and Electronic Mail)

Andrew O. Isar
Director – State Affairs
7901 Skansie Avenue, Suite 240
Gig Harbor, WA 98335
(ASCENT)
(U. S. Mail and Electronic Mail)

Nanette Edwards, Esquire
ITC^DeltaCom Communications, Inc.
4092 S. Memorial Parkway
Huntsville, Alabama 25802
(U. S. Mail and Electronic Mail)

John A. Doyle, Jr., Esquire
Parker, Poe, Adams & Bernstein, L.L.P.
150 Fayetteville Street Mall, Suite 1400
Raleigh, North Carolina 27602
(US LEC of South Carolina)
(U. S. Mail and Electronic Mail)



Nyla M. Laney

PC Docs # 554784

EXHIBIT D

BellSouth Telecommunications, Inc
333 Commerce Street
Suite 2101
Nashville, TN 37201-3300

guy hicks@bellsouth com

Guy M Hicks
General Counsel

615 214 6301
Fax 615 214 7406

February 22, 2005

VIA HAND DELIVERY

Hon Pat Miller
Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, Tennessee 37238

Re *Approval of the Amendments to the Interconnection Agreement Negotiated by BellSouth Telecommunications, Inc and NewSouth Communications Corp Pursuant to Sections 251 and 252 of the Telecommunications Act of 1996*
Docket No 05-00061

Dear Chairman Miller

Pursuant to Section 252(e) of the Telecommunications Act of 1996, NewSouth Communications Corp and BellSouth Telecommunications, Inc. are hereby submitting to the Tennessee Regulatory Authority the original and fourteen copies of the attached Petition for Approval of the Amendments to the Interconnection Agreement dated May 18, 2001. The first Amendment revises the Notice provision in the Agreement and the second Amendment adds Quickserve to the Agreement

Thank you for your attention to this matter.

Sincerely yours,

Guy M. Hicks

cc: Bo Russell, NewSouth Communications, Corp.
John Heitmann, NewSouth Communications, Corp
Mary Campbell, NewSouth Communications, Corp.
John Fury, NewSouth Communications, Corp

#420636

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In re: *Approval of the Amendments to the Interconnection Agreement Negotiated by BellSouth Telecommunications, Inc. and NewSouth Communications Corp Pursuant to Sections 251 and 252 of the Telecommunications Act of 1996*

Docket No. _____

PETITION FOR APPROVAL OF THE AMENDMENTS TO THE INTERCONNECTION AGREEMENT NEGOTIATED BETWEEN BELLSOUTH TELECOMMUNICATIONS, INC. AND NEWSOUTH COMMUNICATIONS CORP. PURSUANT TO THE TELECOMMUNICATIONS ACT OF 1996

COME NOW, NewSouth Communications Corp. ("NewSouth") and BellSouth Telecommunications, Inc., ("BellSouth"), and file this request for approval of the Amendments to the Interconnection Agreement dated May 18, 2001 (the "Amendment") negotiated between the two companies pursuant to Sections 251 and 252 of the Telecommunications Act of 1996, (the "Act"). In support of their request, NewSouth and BellSouth state the following:

1. NewSouth and BellSouth have successfully negotiated an agreement for interconnection of their networks, the unbundling of specific network elements offered by BellSouth and the resale of BellSouth's telecommunications services to NewSouth. The Interconnection Agreement was filed with the Tennessee Regulatory Authority ("TRA") on August 1, 2001 for approval.

2. The parties have recently negotiated two Amendments to the Agreement. The first Amendment revises the Notice provision in the Agreement and the second Amendment adds QuickServe to the Agreement. Copies of the Amendments are attached hereto and incorporated herein by reference.

3. Pursuant to Section 252(e) of the Telecommunications Act of 1996, NewSouth and BellSouth are submitting their Amendments to the TRA for its consideration and approval.

The Amendments provide that either or both of the parties are authorized to submit the Amendments to the TRA for approval.

4. In accordance with Section 252(e) of the Act, the TRA is charged with approving or rejecting the negotiated Amendments between BellSouth and NewSouth within 90 days of their submission. The Act provides that the TRA may only reject such an agreement if it finds that the agreement or any portion of the agreement discriminates against a telecommunications carrier not a party to the agreement or the implementation of the agreement or any portion of the agreement is not consistent with the public interest, convenience and necessity.

5. NewSouth and BellSouth aver that the Amendments are consistent with the standards for approval.

6. Pursuant to 47 USC Section 252(i) and 47 C.F.R. Section 51.809, BellSouth shall make available the entire Interconnection Agreement filed and approved pursuant to 47 USC Section 252.

NewSouth and BellSouth respectfully request that the TRA approve the Amendments negotiated between the parties.

This 23rd day of Feb., 2005.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC.

By: _____

Guy M. Hicks
333 Commerce Street, Suite 2101
Nashville, Tennessee 37201-3300
(615) 214-6301
Attorney for BellSouth

CERTIFICATE OF SERVICE

I, Guy M. Hicks, hereby certify that I have served a copy of the foregoing Petition for Approval of the Amendments to the Interconnection Agreement on the following via United States Mail on the 23rd day of Feb., 2005:

Mr. Bo Russell
NewSouth Communications, Corp.
2 N. Main St.
Greenville, SC 29601

Mr. John Hitmann
NewSouth Communications, Corp.
1200 19th Street, NEW
Suite 500
Washington, DC 20036

Ms. Mary Campbell
NewSouth Communications, Corp.
2 N. Main St.
Greenville, SC 29601

Mr John Fury
NewSouth Communications Corp.
2 N. Main St.
Greenville, SC 29601

Guy M. Hicks

Amendment to the Agreement
Between
NewSouth Communications, Corp.
and
BellSouth Telecommunications, Inc.
Dated May 18, 2001

Pursuant to this Amendment, (the "Amendment"), NewSouth Communications, Corp ("NewSouth"), and BellSouth Telecommunications, Inc ("BellSouth"), hereinafter referred to collectively as the "Parties," hereby agree to amend that certain Interconnection Agreement between the Parties dated May 18, 2001 ("Agreement") to be effective thirty (30) calendar days after the date of the last signature executing the Amendment ("Effective Date")

WHEREAS, BellSouth and NewSouth entered into the Agreement on May 18, 2001, and,

NOW THEREFORE, in consideration of the mutual provisions contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby covenant and agree as follows

1 To replace the Notices contacts for NuVox Communications, Inc with the following

Mr Bo Russell
2 N Main St
Greenville, SC 29601
brussell@nuvox com

Mr John Heitmann
1200 19th Street, NW
Suite 500
Washington, DC 20036
JHeitmann@KelleyDrye com

Copy to
Ms Mary Campbell
2 N Main St
Greenville, SC 29601
MCampbell@nuvox com

Mr John Fury
2 N Main St
Greenville, SC 29601
JFury @ nuvox com

2 All of the other provisions of the Agreement, dated May 18, 2001, shall remain in full force and effect

3 Either or both of the Parties are authorized to submit this Amendment to the respective state regulatory authorities for approval subject to Section 252(e) of the Federal Telecommunications Act of 1996

IN WITNESS WHEREOF, the Parties have executed this Amendment the day and year written below

BellSouth Telecommunications, Inc.	**NewSouth Communications, Corp.**
By Kristen Rowe	By Jake E. Jennings
Name Kristen Rowe	Name Jake E. Jennings
Title. Director	Title VP, Regulatory Affairs
Date 1/21/05	Date 01-18-05

[CCCS Amendment 2 of 2]

Amendment to the Agreement
Between
NewSouth Communications, Corp.
and
BellSouth Telecommunications, Inc.
Dated May 18, 2001

Pursuant to this Amendment, (the "Amendment"), NewSouth Communications, Corp ("NewSouth"), and BellSouth Telecommunications, Inc ("BellSouth"), hereinafter referred to collectively as the "Parties," hereby agree to amend that certain Interconnection Agreement between the Parties dated May 18, 2001 ("Agreement") to be effective February 10, 2005.

WHEREAS, BellSouth and NewSouth entered into the Agreement on May 18, 2001, and,

WHEREAS, both Parties agree that an initial New Installation of a 2-Wire Port/Loop Combination- Residence line provisioned at a Location where QuickServe is available on the line shall incur a QuickServe Non-Recurring Charge (NRC) at the NRC Currently Combined Conversion Rate set forth in the Agreement and that any initial New Installation of a 2-Wire Port/Loop Combination - Residence line provisioned at a location where QuickServe is not available, shall incur the Not Currently Combined NRC, First and Additional rates set forth in the Agreement,

NOW THEREFORE, in consideration of the mutual provisions contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby covenant and agree as follows:

1 The Parties agree to incorporate into Attachment 2 of the Agreement the rates and USOCs as set forth in Exhibit 1 of this Amendment attached hereto and incorporated herein by this reference

2 All of the other provisions of the Agreement, dated May 18, 2001, shall remain in full force and effect

3 Either or both of the Parties are authorized to submit this Amendment to the respective state regulatory authorities for approval subject to Section 252(e) of the Federal Telecommunications Act of 1996

IN WITNESS WHEREOF, the Parties have executed this Amendment the day and year written below

BellSouth Telecommunications, Inc.

By Kristen Rowe

Name Kristen Rowe

Title Director

Date 1/13/05

NewSouth Communications, Corp.

By Jake E. Jennings

Name Jake E. Jennings

Title VP, Regulatory Affairs

Date. 1/14/05

[CCCS Amendment 2 of 20]

BellSouth Telecommunications, Inc
333 Commerce Street
Suite 2101
Nashville, TN 37201-3300

guy hicks@bellsouth com

Guy M Hicks
General Counsel

615 214 6301
Fax 615 214 7406

February 22, 2005

VIA HAND DELIVERY

Hon. Pat Miller
Chairman
Tennessee Regulatory Authority
460 James Robertson Parkway
Nashville, TN 37238

Re. *Approval of the Amendments to the Interconnection Agreement Negotiated by BellSouth Telecommunications, Inc and NuVox Communications, Inc f/k/a Trivergent Communications, Inc Pursuant to Sections 251 and 252 of the Telecommunications Act of 1996*
Docket No 05-00060

Dear Chairman Miller

NuVox Communications, Inc. f/k/a Trivergent Communications, Inc and BellSouth Telecommunications, Inc. are hereby submitting to the Tennessee Regulatory Authority the original and fourteen copies of the executed Amendments to the Interconnection Agreement dated June 30, 2000 The Interconnection Agreement expired on June 29, 2003 and the parties are currently in arbitration proceedings in BellSouth's nine state region The Interconnection Agreement will continue month to month until the arbitrations have been completed

The first Amendment adds Quickserve to the Agreement and the second Amendment replaces the rates for Attachment 3 Local Interconnection in the Agreement

Thank you for your attention to this matter

Sincerely yours,

Guy M. Hicks

GMH/dt

Enclosure

cc: Hamilton E. Russell, III, Trivergent Communications, Inc
John J. Heitmann, Esquire, Attorney for Trivergent Communications, Inc
Don Baltimore, Esquire, Attorney for Trivergent Communications, Inc

#538118

BEFORE THE TENNESSEE REGULATORY AUTHORITY
Nashville, Tennessee

In re: *Approval of the Amendments to the Interconnection Agreement Negotiated by BellSouth Telecommunications, Inc. and NuVox Communications, Inc. f/k/a Trivergent Communications, Inc. Pursuant to Sections 251 and 252 of the Telecommunications Act of 1996*

Docket No. _____

PETITION FOR APPROVAL OF THE AMENDMENTS TO THE INTERCONNECTION AGREEMENT NEGOTIATED BETWEEN BELLSOUTH TELECOMMUNICATIONS, INC. AND NUVOX COMMUNICATIONS, INC. F/K/A TRIVERGENT COMMUNICATIONS, INC. PURSUANT TO THE TELECOMMUNICATIONS ACT OF 1996

COME NOW, NuVox Communications, Inc. f/k/a Trivergent Communications, Inc. ("NuVox") and BellSouth Telecommunications, Inc., ("BellSouth"), and file this request for approval of the Amendments to the Interconnection Agreement dated June 30, 2000 (the "Amendment") negotiated between the two companies pursuant to Sections 251 and 252 of the Telecommunications Act of 1996, (the "Act"). In support of their request, NuVox and BellSouth state the following:

1. NuVox and BellSouth have successfully negotiated an agreement for interconnection of their networks, the unbundling of specific network elements offered by BellSouth and the resale of BellSouth's telecommunications services to NuVox. The Interconnection Agreement was approved by the Tennessee Regulatory Authority ("TRA") on October 24, 2000.

2. The Interconnection Agreement expired on June 29, 2003 and the parties are currently in arbitration proceedings in BellSouth's nine state region. The Interconnection Agreement will continue month to month until the arbitrations have been completed.

3. The parties have recently negotiated two Amendments to the Agreement. The first Amendment adds Quickserve to the Agreement and the second Amendment replaces the rates for Attachment 3 Local Interconnection in the Agreement.

4. Pursuant to Section 252(e) of the Telecommunications Act of 1996, NuVox and BellSouth are submitting their Amendments to the TRA for its consideration and approval. The Amendments provide that either or both of the parties are authorized to submit the Amendments to the TRA for approval.

5. In accordance with Section 252(e) of the Act, the TRA is charged with approving or rejecting the negotiated Amendments between BellSouth and NuVox within 90 days of their submission. The Act provides that the TRA may only reject such an agreement if it finds that the agreement or any portion of the agreement discriminates against a telecommunications carrier not a party to the agreement or the implementation of the agreement or any portion of the agreement is not consistent with the public interest, convenience and necessity.

6. NuVox and BellSouth aver that the Amendments are consistent with the standards for approval.

7. Pursuant to 47 USC Section 252(i) and 47 C.F.R. Section 51.809, BellSouth shall make available the entire Interconnection Agreement filed and approved pursuant to 47 USC Section 252.

NuVox and BellSouth respectfully request that the TRA approve the Amendment negotiated between the parties.

This 23rd day of Feb., 2005.

Respectfully submitted,

BELLSOUTH TELECOMMUNICATIONS, INC

By _____
Guy M. Hicks
333 Commerce Street, Suite 2101
Nashville, Tennessee 37201-3300
(615) 214-6301
Attorney for BellSouth

CERTIFICATE OF SERVICE

I, Guy M. Hicks, hereby certify that I have served a copy of the foregoing Petition for Approval of the Amendments to the Interconnection Agreement on the following via United States Mail, on the 23rd day of Feb., 2005:

Hamilton E. Russell, III
Regional Vice President – Legal and Regulatory Affairs
NuVox Communications, Inc. (formerly TriVergent)
301 North Main Street, Suite 500
Greenville, SC 29601

John J. Heitmann Esquire
Counsel to NuVox Communications, Inc.
Kelley Drye & Warren LLP
1200 19th Street, NW
Washington, DC 20036

Don Baltimore, Esquire
Farrar & Bates
211 Seventh Avenue North, Suite 420
Nashville, TN 37219-1823

_____
Guy M. Hicks

Amendment to the Agreement
Between
NuVox Communications, Inc. (fka Trivergent Communications, Inc.)
and
BellSouth Telecommunications, Inc.
Dated June 30, 2000

Pursuant to this Amendment, (the "Amendment"), NuVox Communications, Inc (fka Trivergent Communications, Inc) (NuVox), and BellSouth Telecommunications, Inc ("BellSouth"), hereinafter referred to collectively as the "Parties," hereby agree to amend that certain Interconnection Agreement between the Parties dated June 30, 2000 ("Agreement") to be effective thirty (30) calendar days after the date of the last signature executing the Amendment

WHEREAS, BellSouth and NuVox entered into the Agreement on June 30, 2000, and,

NOW THEREFORE, in consideration of the mutual provisions contained herein and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties hereby covenant and agree as follows

1 The Parties agree to replace the rates in Exhibit A of Attachment 3, with the rates set forth in Exhibit 1 of this Amendment, attached hereto and incorporated herein by this reference.

2 All of the other provisions of the Agreement, dated June 30, 2000, shall remain in full force and effect

3 Either or both of the Parties are authorized to submit this Amendment to the respective state regulatory authorities for approval subject to Section 252(e) of the Federal Telecommunications Act of 1996

IN WITNESS WHEREOF, the Parties have executed this Agreement the day and year written below.

BellSouth Telecommunications, Inc.	**NuVox Communications, Inc. (fka Trivergent Communications, Inc.)**
By: Kristen E Lowe	By:
Name: KRISTEN E. LOWE	Name: Hamilton E. Russell
Title. DIRECTOR	Title. VP Legal Affairs
Date: 1/12/05	Date: 01-07-05

[CCCS Amendment 2 of 11]

EXHIBIT E

Meza, James

From: Meza, James
Sent: Friday, July 09, 2004 2:21 PM
To: 'Heitmann, John'
Cc: Rankin, Edward; Joyce, Stephanie; Hendrickson, Heather T.; Campen, Jr., Henry C.
Subject: Motion to Hold in Abeyance_v12.DOC

John: Attached are my suggested revisions to the draft motion. BellSouth agrees to the Jan. 11-14 hearing dates in NC and to pushing each state's hearing date back by the same amount of time. Please let me know if you have any questions.

Regards,

Jim

Motion to Hold in Abeyance_v12...

BEFORE THE
NORTH CAROLINA UTILITIES COMMISSION

Docket No. P-772, Sub 8
Docket No. P-913, Sub 5
Docket No. P-989, Sub 3
Docket No. P-824, Sub 6
Docket No. P-1202, Sub 4

In the Matter of **Joint Petition of NewSouth Communications Corp. *et al.* for Arbitration with BellSouth Telecommunications, Inc.**	**JOINT MOTION TO HOLD PROCEEDING IN ABEYANCE**

JOINT MOTION TO HOLD PROCEEDING IN ABEYANCE

NewSouth Communications Corp. ("NewSouth"), NuVox Communications, Inc. ("NuVox"), KMC Telecom V, Inc. and KMC Telecom III, LLC (collectively "KMC"), and Xspedius Communications, LLC on behalf of its operating subsidiary Xspedius Management Company Switched Services, LLC ("Xspedius") (collectively the "Joint Petitioners") and BellSouth Telecommunications, Inc. ("BellSouth") (together, the "Parties"), through their respective counsel, submit this Joint Motion to Hold Proceeding in Abeyance and hereby respectfully request that the [redacted] (the "Commission") hold the above-captioned proceeding in abeyance for a period of ninety (90) days. In doing so, the Parties request that the Commission suspend all pending deadlines and consideration of all pending motions until after October 1, 2004. ~~Thereafter, arbitration-related activity would resume with submission of a revised issues matrix, supplemental pre-filed direct testimony by the Joint Petitioners and supplemental pre-filed reply testimony by BellSouth and a resumption of additional procedures, including Joint Petitioners' rebuttal testimony, established up to and including the~~

~~hearing.~~ By this Joint Motion, and contingent upon a grant by the Commission of the relief requested herein, the Parties waive through [redacted] the deadline, under section 252(b)(4)(C) of the Act, 47 U.S.C. § 252(b)(4)(C), for final resolution by the Commission of the issues in this arbitration. In support of this Joint Motion, the Parties submit the following.

~~Each of the Joint Petitioners and BellSouth currently are parties to an interconnection agreement, arising under sections 251 and 252 of the Act, 47 C.F.R. §§ 251 and 252, for the State of [redacted]. Although the terms of the Parties' current interconnection agreements have expired, the Joint Petitioners and BellSouth have agreed to continue to operate under the rates, terms and conditions set forth in those agreements until such time as a replacement interconnection agreement ensues from this arbitration proceeding and is approved by the Commission.~~

Joint Petitioners and BellSouth have engaged in the above-captioned arbitration proceeding since February 11, 2004. On March 2, 2004, the United States Court of Appeals for the District of Columbia Circuit, in *United States Telecom Ass'n v. FCC*, 359 F.3d 554 (D.C. Cir.2004) ("*USTA II*"), ~~affirmed~~ in part, and vacated and remanded in part, the rules of the Federal Communications Commission ("FCC"), pursuant to which ~~applicable to the~~ incumbent LECs are obligated ~~'s obligation~~ to provide to any requesting telecommunications carrier access to network elements on an unbundled basis. The D.C. Circuit initially stayed its *USTA II* mandate for a period of sixty (60) days. The stay of the *USTA II* mandate later was extended by the D.C. Circuit for a period of forty-five (45) days, until June 15, 2004 on which date the D.C. Circuit's *USTA II* mandate issued. At this time, certain of the FCC's rules applicable to BellSouth's obligation to provide to Joint Petitioners network elements on an unbundled basis are vacated and the FCC is

expected to issue new rules. ~~subject to review and revision by the FCC, as ordered by the D.C. Circuit.~~

In light of these events, the Parties have agreed to the proposed 90-day abatement so that they can consider how the post *USTA II* regulatory framework should be incorporated into the new agreements currently being arbitrated and to identify what arbitration issues may be impacted and what additional issues, if any, need to be identified for arbitration. The Parties have agreed that no new issues may be raised in this arbitration proceeding other than those that result from the Parties' negotiations regarding the post-*USTA II* regulatory framework.

With this framework~~In so doing~~, the Joint Petitioners and BellSouth have agreed to avoid a separate/second process of negotiating/arbitrating change-of-law amendments to the current interconnection agreements based on *USTA II*. Additionally, ~~which~~ the Parties have agreed that they will continue operating under their current Interconnection Agreements until they are able to move into the new arbitrated/negotiated agreements that ensue from this proceeding. ~~The Parties have agreed that this process of assessing the impact of the post *USTA II* regulatory framework will commence with a BellSouth produced redline (including BellSouth's suggested revisions) of the latest arbitration version of Attachment 2 (May 23, 2004) of the new interconnection agreements currently before the Commission in this arbitration proceeding. Additional redlines, negotiations, and issue identification will take place during the 90 day period. The Parties have agreed that no new issues may be raised other than those that result from the Parties' negotiations regarding the post *USTA II* regulatory framework.~~

During this ninety (90) day period, ~~T~~the Parties also have agreed to continue their efforts to reduce the number of issues already identified. In this regard, the Parties have agreed to conduct multiple a face-to-face ~~issue resolution meeting to take place on July 8, 2004~~negotiations.

Consistent with the foregoing, the Joint Petitioners and BellSouth hereby respectfully request that the Commission hold the above-captioned proceeding in abeyance for a period of ninety (90) days. In so doing, the Parties request that the Commission suspend all pending deadlines and consideration of all pending motions until after October 1, 2004. The Parties also jointly propose and request approval of the following revised procedural schedule.

[redacted]	Revised Issues Matrix
	Supplemental Direct Testimony (Joint Petitioners)
	Supplemental Reply Testimony (BellSouth)
	Rebuttal Testimony (Joint Petitioners)
Dec. 14-17, 2004	Hearing

John: Would we move the NC hearing back to Jan 11th per your request?

Respectfully submitted,

[redacted]
BELLSOUTH TELECOMMUNICATIONS, INC.

Henry C. Campen, Jr.
Parker Poe Adams & Bernstein LLP
Wachovia Capitol Center
150 Fayetteville Street Mall
Suite 1400
Raleigh, NC 27602-0389
Telephone: (919) 890-4145
henrycampen@parkerpoe.com

R. Douglas Lackey
James Meza III
BELLSOUTH TELECOMMUNICATIONS, INC.
675 W. Peachtree Street
Suite 433
Atlanta, Georgia 30375
(404) 335-0765

John J. Heitmann
Stephanie Joyce
Heather Hendrickson
KELLEY DRYE & WARREN LLP
1200 Nineteenth Street, N.W.
Suite 500
Washington, D.C. 20036
(202) 955-9600 (telephone)
(202) 955-9792 (facsimile)

Dated: February 25, 2005~~July 9, 2004~~

EXHIBIT F

PARKER POE

PARKER POE ADAMS & BERNSTEIN LLP

Attorneys and Counselors at Law

Henry C. Campen, Jr.
Partner
Telephone: 919.890.4145
Direct Fax: 919.834.4564
henrycampen@parkerpoe.com

Wachovia Capitol Center
150 Fayetteville Street Mall
Suite 1400
Post Office Box 389
Raleigh, NC 27602-0389
Telephone 919.828.0564
Fax 919.834.4564
www.parkerpoe.com

December 2, 2004

FILED

DEC 0 2 2004

Clerk's Office
N.C. Utilities Commission

OFFICIAL COPY

Via Hand Deliverv
Ms. Geneva Thigpen
Chief Clerk
North Carolina Utilities Commission
430 N. Salisbury Street
Raleigh, NC 27601

Re: Docket No. P-294, Sub 28

Dear Ms. Thigpen:

Enclosed are an original and twenty-eight (28) copies KMC Telecom III LLC, KMC Telecom V, Inc., KMC Data LLC's And Sprint Communications Company, LP's Joint Motion to Hold Proceeding in Abeyance in the above-referenced docket. Please return one date-stamped copy to me via our courier.

Thank you for your assistance in this matter.

Sincerely,

Henry C. Campen, Jr.

HCC:ckc

Enclosure

cc: Jack H. Derrick (by e-mail and U.S. mail)
Edward Phillips (by U.S. mail)
Janette Luehring, (by U.S. mail)

CHARLESTON, SC
CHARLOTTE, NC
COLUMBIA, SC
SPARTANBURG, SC

RAL 300166v1

STATE OF NORTH CAROLINA
UTILITIES COMMISSION

DOCKET NO. P-294, SUB 28

BEFORE THE NORTH CAROLINA UTILITIES COMMISSION

In the Matter of:	)	
	)	
Petition of KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC for Arbitration of an Interconnection Agreement with Sprint Communications Company, LP Pursuant to Section 252(b) of the Communications Act of 1934, as Amended.	)	**JOINT MOTION OF KMC TELECOM III LLC, KMC TELECOM V, INC., KMC DATA LLC AND SPRINT COMMUNICATIONS COMPANY, LP TO HOLD PROCEEDING IN ABEYANCE**

Sprint Communications Company, LP ("Sprint") and KMC Telecom III LLC, KMC Telecom V, Inc., and KMC Data LLC (collectively "KMC") (jointly referred to herein as "Parties") submit this Joint Motion and respectfully request that the Commission hold this arbitration proceeding in abeyance until January 21, 2005. In so doing, the Parties request that the Commission suspend all pending deadlines and consideration of any pending motions until after January 21, 2005. By this Joint Motion, and upon the contingency that the Commission grants the relief requested herein, the Parties agree to waive the time frames specified in 47 U.S.C. 252(b)(4)(C) and agree not to appeal an arbitration decision on the grounds that the Commission failed to act within those time frames. In support of this Joint Motion, the Parties state as follows:

1. This arbitration was filed by KMC on December 23, 2003. Prior to the filing of the Petition for Arbitration, the Parties were negotiating the appropriate terms and conditions for the Master Interconnection and Resale Agreement ("Agreement") based on the law effective during the negotiations. In a decision dated March 2, 2004 the United States Court of Appeals for the District of Columbia Circuit, in *United States Telecom Ass'n v. FCC,* 359 F.3d 554) ("*USTA II*"), affirmed in part, vacated in part, and remanded in part certain rules of the Federal

Communications Commission ("FCC") that govern the rights and obligations of ILECs and CLECs regarding services and unbundled network elements. While the effectiveness of the *USTA II* decision was initially stayed by the court, the court's mandate was ultimately issued on June 15, 2004. On August 20, 2004, the FCC released its Order in *In the Matter of Unbundled Access to Network Elements; Review of the Section 251 Unbundling Obligations of Incumbent Local Exchange Carriers*, WC Docket No. 04-313, CC Docket No. 01-338, FCC 04-179 ("*Interim Order*"). The FCC has indicated its intent to issue unbundling rules prior to the end of 2004.

2. In consideration of the circumstances noted above, the Parties respectfully request that the Commission hold this proceeding in abeyance to provide additional time for the Parties to address the effect of the post-*USTA II* regulatory framework, the Interim Order, and the forthcoming unbundling rules on the terms, conditions and rates that should be included in the Agreement, as well as to identify any related issues for resolution in this arbitration. KMC and Sprint agree that no new issues may be raised in this arbitration proceeding other than those that result from the Parties' negotiations regarding the above referenced rules and orders that have occurred after the date this arbitration was filed.

3. The Parties have therefore agreed to an abeyance until January 21, 2005 to provide KMC and Sprint with the time necessary to incorporate into the Agreement language reflective of the above referenced rules and orders that have occurred after the date this arbitration was filed. The Parties may respectfully request a further abeyance depending on, for example, the status of the FCC's rules, during the abeyance period. The abeyance would promote administrative efficiency, in that it would permit the Parties to avoid negotiating and arbitrating the unbundling provisions of the interconnection agreement multiple times based on changing rules and to efficiently identify any and all issues in need resolution by the

Commission, and thereby avoid a separate and/or duplicative negotiation and arbitration of interconnection agreement terms to reflect the above referenced rules and orders that have occurred after the date this arbitration was filed. In short, the Parties believe that it is reasonable to account for the new realities created by the-post-*USTA II* regulatory framework, *the Interim Order*, and the forthcoming unbundling rules. The Parties have agreed that they will continue to operate under their current interconnection Agreement until they execute the new agreement that results from this proceeding. During the abeyance period, the Parties would also continue their efforts to close the few remaining issues already included in the arbitration.

In light of the foregoing, Sprint and KMC respectfully request that the Commission hold this arbitration proceeding in abeyance until January 21, 2005. Upon the conclusion of the abeyance time-period, the Parties propose that KMC would file a supplement to its Petition for Arbitration and a revised issues matrix to identify all remaining issues in need resolution by the Commission, and that Sprint would then file a supplemental response and revised issues matrix.

This the 2nd day of December, 2004

By: Jack H. Derrick / by HC

Jack H. Derrick, Senior Attorney
Edward Phillips, Attorney
SPRINT COMMUNICATIONS COMPANY, L.P.
Carolina Telephone and Telegraph Company
Central Telephone Company
14111 Capital Boulevard
NCWKFR0313
Wake Forest, North Carolina 27587-5900

Janette Luehring, Esq.
Sprint
6450 Sprint Parkway
KSOPHN0212-2A511
Overland Park, KS 66251

Attorneys for Sprint

By: [signature]

Henry C. Campen, Jr., Esq.
N.C. State Bar No. 13346
Parker, Poe, Adams & Bernstein, LLP
Wachovia Capitol Center
150 Fayetteville Street Mall, Suite 1400
P.O. Box 389
Raleigh, North Carolina 27602-0389
(919) 828-0564 (voice)
(919) 834-4565 (facsimile)
henrycampen@parkerpoe.com

Edward A. Yorkgitis, Jr.
Enrico C. Soriano
Kelley Drye & Warren LLP
1200 19th Street, N.W., Fifth Floor
Washington, D.C. 20036
(202) 955-9600 (voice)
(202) 955-9792 (facsimile)
EYorkgitis@KelleyDrye.com
ESoriano@KelleyDrye.com

Marva Brown Johnson
KMC Telecom Holdings, Inc.
1755 North Brown Road
Lawrenceville, GA 30043
(678) 985-6220 (voice)
(678) 985-6213 (facsimile)
marva.johnson@kmctelecom.com

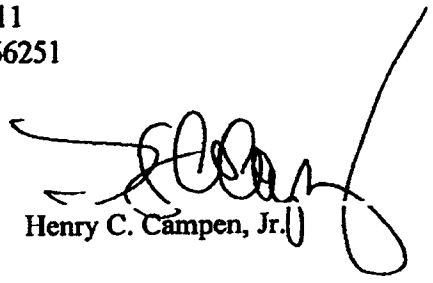
Attorneys for KMC

CERTIFICATE OF SERVICE

I, Henry C. Campen, Jr., do hereby certify that I have on this 2nd day of December, 2004, served a copy of the foregoing JOINT MOTION OF KMC TELECOM III LLC, KMC TELECOM V, INC., KMC DATA LLC AND SPRINT COMMUNICATIONS, LP TO HOLD PROCEEDING IN ABEYANCE, by electronic mail or first class U.S. mail, postage prepaid, upon the following individuals:

Jack H. Derrick, Senior Attorney
Edward Phillips, Attorney
Sprint Communications Company, L.P.
Carolina Telephone and Telegraph Company
Central Telephone Company
14111 Capital Boulevard
NCWKFR0313
Wake Forest, North Carolina 27587-5900

Janette Luehring, Esq.
Sprint
6450 Sprint Parkway
KSOPHN0212-2A511
Overland Park, KS 66251



Henry C. Campen, Jr.

STATE OF SOUTH CAROLINA)
) CERTIFICATE OF SERVICE
COUNTY OF RICHLAND)

The undersigned, Nyla M. Laney, hereby certifies that she is employed by the Legal Department for BellSouth Telecommunications, Inc. ("BellSouth") and that she has caused BellSouth Telecommunications, Inc.'s Brief in Response to Petition for Emergency Relief in Docket No. 2004-316-C to be served upon the following this March 8, 2005:

Florence P. Belser, Esquire
General Counsel
Post Office Box 11263
Columbia, South Carolina 29211
(Office of Regulatory Staff)
(U. S. Mail and Electronic Mail)

Stan Bugner
State Director
1301 Gervais Street
Suite 825
Columbia, South Carolina 29201
(Verizon)
(U. S. Mail and Electronic Mail)

Steven W. Hamm, Esquire
C. Jo Anne Wessinger Hill, Esquire
Richardson, Plowden, Carpenter & Robinson, P.A.
1600 Marion Street
Post Office Box 7788
Columbia, South Carolina 29202
(Verizon)
(U. S. Mail and Electronic Mail)

Jocelyn G. Boyd, Esquire
Staff Attorney
S. C. Public Service Commission
Post Office Box 11649
Columbia, South Carolina 29211
(PSC Staff)
(U. S. Mail and Electronic Mail)

F. David Butler, Esquire
General Counsel
S. C. Public Service Commission
Post Office Box 11649
Columbia, South Carolina 29211
(PSC Staff)
(U. S. Mail and Electronic Mail)

Robert E. Tyson, Jr., Esquire
Sowell Gray Stepp & Laffitte
1310 Gadsden Street
Columbia, South Carolina 29211
(ITC^Delta Com Communications, Inc.)
(U. S. Mail and Electronic Mail)

M. John Bowen, Jr., Esquire
Margaret M. Fox, Esquire
McNair Law Firm, P.A.
Post Office Box 11390
Columbia, South Carolina 29211
(SCTC)
(U. S. Mail and Electronic Mail)

William Atkinson, Esquire
Attorney, State Regulatory
3065 Cumberland Circle
Mailstop GAATLD0602
Atlanta, Georgia 30339
(United Telephone Company of the Carolinas and
Sprint Communications Company, L.P.)
(U. S. Mail and Electronic Mail)

Russell B. Shetterly, Esquire
P. O. Box 8207
Columbia, South Carolina 29202
(Knology of Charleston and Knology of
South Carolina, Inc.)
(U. S. Mail and Electronic Mail)

Darra W. Cothran, Esquire
Woodward, Cothran & Herndon
1200 Main Street, 6th Floor
Post Office Box 12399
Columbia, South Carolina 29211
(MCI WorldCom Network Service, Inc.
MCI WorldCom Communications and
MCImetro Access Transmission Services, Inc.)
(U. S. Mail and Electronic Mail)

John J. Pringle, Jr., Esquire
Ellis Lawhorne & Sims, P.A.
Post Office Box 2285
Columbia, South Carolina 29202
(AT&T)
(U. S. Mail and Electronic Mail)

Marsha A. Ward, Esquire
Kennard B. Woods, Esquire
MCI WorldCom, Inc.
Law and Public Policy
6 Concourse Parkway, Suite 3200
Atlanta, Georgia 30328
(MCI)
(U. S. Mail and Electronic Mail)

Frank R. Ellerbe, Esquire
Bonnie D. Shealy, Esquire
Robinson, McFadden & Moore, P.C.
1901 Main Street, Suite 1200
Post Office Box 944
Columbia, South Carolina 29202
(South Carolina Cable Television Association)
(U. S. Mail and Electronic Mail)

Genevieve Morelli
Kelley, Drye & Warren, LLP
1200 19th Street, N.W.
Washington, D.C. 20036
(KMC Telecom III, Inc.)
(U. S. Mail and Electronic Mail)

John D. McLaughlin, Jr.
Director, State Government Affairs
KMC Telecom, Inc.
1755 North Brown Road
Lawrenceville, GA 30043
(KMC Telecom)
(U. S. Mail and Electronic Mail)

Scott A. Elliott, Esquire
Elliott & Elliott
721 Olive Street
Columbia, South Carolina 29205
(Sprint/United Telephone)
(U. S. Mail and Electronic Mail)

Marty Bocock, Esquire
Director of Regulatory Affairs
1122 Lady Street, Suite 1050
Columbia, South Carolina 29201
(Sprint/United Telephone Company)
(U. S. Mail and Electronic Mail)

Faye A. Flowers, Esquire
Parker Poe Adams & Bernstein LLP
1201 Main Street, Suite 1450
Columbia, South Carolina 29202
(US LEC of South Carolina and Southeastern Competitive Carriers Association)
(U. S. Mail and Electronic Mail)

Andrew O. Isar
Director – State Affairs
7901 Skansie Avenue, Suite 240
Gig Harbor, WA 98335
(ASCENT)
(U. S. Mail and Electronic Mail)

Nanette Edwards, Esquire
ITC^DeltaCom Communications, Inc.
4092 S. Memorial Parkway
Huntsville, Alabama 25802
(U. S. Mail and Electronic Mail)

John A. Doyle, Jr., Esquire
Parker, Poe, Adams & Bernstein, L.L.P.
150 Fayetteville Street Mall, Suite 1400
Raleigh, North Carolina 27602
(US LEC of South Carolina)
(U. S. Mail and Electronic Mail)

Glenn S. Richards, Esquire
Shaw Pittman LLP
2300 N. Street, NW
Washington, DC 20037
(AmeriMex Communications Corp.)
(U. S. Mail and Electronic Mail)

Nyla M. Laney

PC Docs # 554784